THE BARBARY WAR AND EARLY PRECEDENTS IN EXECUTIVE WAR POWER

A Thesis
submitted to the Faculty of
The School of Continuing Studies
and of
The Graduate School for the Arts and Sciences
in partial fulfillment of the requirement for the
degree of
Master of Arts
in Liberal Studies

By

Nicholas J. Lunsford, B.A.

Georgetown University
Washington, D.C.
April 1, 2013
THE BARBARY WAR AND EARLY PRECEDENTS IN EXECUTIVE WAR POWER

Nicholas J. Lunsford, B.A.

Mentor: Charles Yonkers, J.D.

ABSTRACT

The proper roles of the President and the Congress in matters of war of peace have been hotly contested since the founding of the republic. Contemporary scholars and politicians consult the Constitution for answer to the war power question, but the language therein is subject to a great degree of interpretation. This induced vagueness was not an oversight by the Philadelphia Convention, but an effort to provide the President and the Congress with some flexibility. It was – like much of the language in the Constitution – a mark of the document’s genius and vexation. Even among the principal political figures of the founding era, there was considerable disagreement about the constitutional limits of executive war power. But where the Founders left uncertainty in the Constitution’s language vis-à-vis war power, the first three presidential administrations and their Congressional counterparts provided a great deal of precedent. This thesis will examine early uses of American military power with particular focus on Jefferson’s prosecution of the First Barbary War, and will conclude that the contemporary relationship between the Executive and Legislative branch on the issue of war power can be largely attributed to precedents set by the Washington, Adams, and Jefferson administrations.
# CONTENTS

ABSTRACT ........................................................................................................... ii
INTRODUCTION ............................................................................................... 1
CHAPTER ONE .................................................................................................. 6
CHAPTER TWO .................................................................................................. 24
CHAPTER THREE .............................................................................................. 37
CHAPTER FOUR ................................................................................................ 54
CONCLUSION .................................................................................................... 77
NOTES .................................................................................................................. 86
BIBLIOGRAPHY ............................................................................................... 93
INTRODUCTION

A Crisis in Libya

On the wind-swept desert of northern Africa, a small team of American commandos and a coalition of rebel fighters urgently set up a defensive position in the small outpost of Derne. Weeks earlier, this unlikely group of U.S. special operators, Arab fighters, and contract mercenaries had wrested Derne away from the forces of the reigning dictator in a combined land-sea assault. Throughout the month that followed, the rebel fighters and their American advisors repelled several counterattacks, demoralizing the enemy with superior tactics and firepower.

Slow communication with Washington, conflicting orders from State Department and Navy officials, and limited resources left the Americans and their allies in a precarious position, however. Should the rebel force continue to march west? Could they count on the supplies and support that would be required to capture Tripoli and install the new regime? Would the citizens of Benghazi, Tripoli, and every town between greet them as liberators or resist their advance? The answers to those questions were not apparent.

Word finally reached the American forces that an agreement had been reached with the reigning government and that hostilities were to cease. Their orders were to secretly withdraw from the town, abandoning everyone but the opposition leader whose safe passage out of the country would be secured by the Navy. Under the guise of launching their own counterattack against the dictator’s siege force, the American agent commanding the operation sent the rebel fighters to the outskirts of the town, mustered his troops, and quietly slipped away with the opposition leadership to a waiting warship.
When news of the brokered peace and the abandoned overthrow reached Washington, the President’s enemies in Congress seized on the opportunity to embarrass his administration. Many viewed the withdrawal as a stain on the nation’s honor, and a reflection of the President’s weakness. Oddly, the President’s congressional opponents seemed less concerned that the administration elected to use defense appropriations to fund the secret overthrow of a sovereign government, and more concerned that the President didn’t see the overthrow through. That the President had the authority to go so far without a formal declaration of war seemed well established. A partisan fight over the mission’s success flourished in the absence of a principled examination of the conflict’s constitutionality.

The story told (coupled with a slightly misleading subtitle) may seem eerily similar to a present-day scenario. But the year was 1805, and the American military force described was a small team of United States Marines and a special agent of the Navy Department working under secret orders from the Jefferson administration. Their mission was to raise, equip, and train an army of mercenaries in Egypt and march them west to overthrow the reigning Bashaw of Tripoli – the pirate fief of an Ottoman client state, which would not be known as Libya for another 140 years. Bashaw Karamanli was to be replaced by his brother who was expected to be more sympathetic to U.S. interests.

The peace deal eventually struck with Bashaw Karamanli resulted in the release of 270 American prisoners of war, and put a brief stop to Tripolitan pirate raids on American merchant ships. The withdrawal from Derne put an end to the United States’ first overseas military adventure. A conflict that had lasted nearly four years, the First
Tripolitan War was, like the Quasi-War, a war in fact but not a war declared. Congress never formally declared war against the Bashaw, but had provided the President with the funds to prosecute the conflict as best he saw fit. This appropriation came after the President initiated the confrontation. Almost immediately after his inauguration, and just days after Congress had left Washington for the summer recess, Jefferson convened his cabinet. The object of this cabinet meeting was to ascertain whether or not he had the authority to send a squadron of frigates to the Mediterranean to engage in hostilities against Tripoli without the prior consent of Congress. President Jefferson was advised that he did not need congressional authorization for such measures if they were “defensive” in nature and that they could commence on his order alone. Congress did not fight this assertion when they reassembled in the fall of 1801, retroactively authorizing the President’s decision and appropriating money to fund the campaign.

For all of the contemporary hand wringing about the erosion of constitutional principles and the rise of an imperial presidency, it’s striking that nearly 12 years to the day after the Constitution took effect, a President who proclaimed himself a strict constructionist, authorized, on his own, a limited naval war against a foreign state and a coup against its leadership. A reasonable argument can be made that Jefferson’s actions were not vital to national security, and were motivated by his long-held belief that North African pirates could only be dealt by military means – that a war in Barbary was Jefferson’s pet project that he now had the chance to test. Jefferson could have ransomed the American prisoners and bought peace with Tripoli in the same manner that Washington, Adams, and every European power of the day had. He could have asked the
members of Congress to stay in session, or waited for them to reconvene in the winter to vote on a war declaration or authorization of force. He could have squashed the proposal to send a team of marines to foment, advise, and lead a land war on foreign soil. Instead, the nation’s third President took a broad interpretation of his authorities as Commander in Chief - and Congress acquiesced.

The war-powers relationship forged between Jefferson and Congress during the first Barbary War was hardly revolutionary. In the twelve years that followed the ratification of the Constitution, the federal government fought native tribes on the northwest frontier, dispatched a 13,000-man army to suppress an anti-tax rebellion, and fought a naval war against France. In each case, the government proceeded without a formal war declaration, and in each case, Congress greatly deferred to the executive branch in the initiation and conduct of those campaigns.

It might come as little surprise that Federalist administrations would take an aggressive stance vis-à-vis executive war powers. Alexander Hamilton’s Federalist party championed an energetic central government, a standing armed force, and a vigorous executive serving as the nation’s chief foreign policy agent. Jefferson’s prosecution of the Barbary campaign was in many ways a tacit endorsement of Federalist principles regarding the executive branch and foreign policy. As a result, Jefferson not only continued a practice of strong executive war powers, but he also sealed the war powers debate as one not rooted in constitutional principles, but partisan jealousies. We see this very clearly in our time. Both Democratic and Republican Congressional members seem much more likely to espouse offense rooted in their affection for the Constitution when a
President of the opposite party initiates hostilities.

The object of this thesis is not to pass judgment on this arrangement, although I submit that, however so cynical, congressional jealousies of executive war power are healthy for a republic. This thesis will also avoid making a judgment on the contemporary balance of war-powers between the legislative and executive branches. Instead, it will argue that the contemporary balance of war power isn’t very contemporary at all. And that if this “contemporary” pattern is, as many pundits suggest, a departure from sound constitutional principles, then the first three presidential administrations and the first eight sessions of Congress are as much to blame as any of their twentieth century counterparts. This thesis will examine the war-powers debate as it existed in the early republic and will challenge the idea that a broad consensus on the subject ever existed in the founding era.
CHAPTER ONE

*The Imperial Presidency*, written by Arthur M. Schlesinger, Jr. in 1973, takes a critical view of the emerging role played by the President in both foreign and domestic affairs in the second half of the 20th century. “Born in the 1940s and 1950s to save the outer world from perdition,” Schlesinger wrote of the imperial presidency, “it began in the 1960s and 1970s to find nurture at home.”\(^1\) Schlesinger asserts that the imperial presidency began to take hold during the Truman administration and was continued by Kennedy when “the presidential mystique was in full glory.”\(^2\)

The imperial presidency was expanded by Presidents Johnson and Nixon who “acquired pretensions to powers construed not only as inherent but exclusive.”\(^3\) Schlesinger argues that it was Nixon especially who took the idea of implied presidential powers beyond the pale. By expanding the Vietnam War into Cambodia without congressional consent, enlarging the executive branch, taking a combative and evasive approach to the media, and using the Commander in Chief title to justify any act, Nixon pushed the limits of presidential authority further than any of his predecessors.\(^4\)

He thereby equipped himself with so expansive a theory of the power of commander in chief and so elastic a theory of defensive war that he could freely, on his own initiative, without a national emergency, without reference to Congress, as a routine employment of unilateral executive authority, go to war against any country containing troops that might in any conceivable circumstance be used in an attack on American forces.\(^5\)

Schlesinger laments a foreign policy that “in an age of intervention had steadily reduced the importance of Congress in the field of national security.”\(^6\) But if the national security role of Congress had diminished, Schlesinger states that Congress was at least
complicit in its own decline. In 1964, Congress passed the Tonkin Gulf Resolution, which stated “that the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.” This prompted Schlesinger to ask, “Was Congress delegating its war-making authority to the President or was it acknowledging his pre-existing authority to do whatever he found necessary?” In either case, Schlesinger found that “the language on its face gave the President remarkable scope.” This may be true, but the language seems little changed from that which gave President Washington the authority to call forth the militia in response to a rebellion in 1794, or that which gave President Jefferson the authority to wage war against Tripolitan pirates in 1802.

The Militia Act of 1792 gave the President the authority to call forth a militia of any size he deemed necessary in the event of an insurrection. The President only needed an associate justice or district judge to certify that the rebellion was beyond the control of civil authorities. With that endorsement, the President could proceed as he saw fit without Congressional authorization specific to the case.

The “Act for the protection of the Commerce and Seaman of the United States, against the Tripolitan Cruisers,” authorized the President to arm and equip as many warships as “he judged requisite.” The act also allowed the President to order the subduing or seizure of Tripolitan ships, and “to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require.” This legislation gave the president considerable discretion over the conduct of the
campaign and only imposed a two-year limit on the time seaman could be employed in the effort (at which point Congress continued the authorization). The measure received only slight resistance in Congress, where it was passed in less than two months. David A. Carson wrote that the “sweeping proposal would grant the president the near-absolute power he wanted in dealing with the Barbary corsairs.”

“Defensive war had always been the doctrine of empire,” Schlesinger warned. But defensive war was precisely what Jefferson invoked at the start of the conflict with Tripoli. This was with good cause. Tripoli, as well as other Barbary regencies, had made a habit of targeting American merchant vessels left vulnerable after the Revolution and subsequent loss of British naval protection, seizing goods and enslaving sailors. Republicans advised Jefferson personally, and Federalists admonished him publically (when he feigned restraint) that congressional consent was not necessary to take defensive measures.

Schlesinger praises Jefferson for his ability to “resist the temptation to enlarge the idea of defensive war.” But as we will see, Jefferson rode this “defensive war” premise through to a full-scale attempt at regime change. If defensive war has been the doctrine of empire, in Jefferson’s case, it was at least the doctrine of trying to prove a point. It allowed him to put in place what he had desired for several years: a military response to the problem of Barbary piracy. It also provided the most effective endorsement of a vigorous wartime executive in that the nation’s first Republican administration adopted a Federalist approach to the matter.
Schlesinger argues that Presidents were once constrained not only by the language of the Constitution, but also by unwritten checks that were found in the forces and institutions that the President once had to take into practical account: the cabinet, Congress, the judiciary, the press, public opinion, etc. Schlesinger suggests that by the Vietnam War, these unwritten checks had far less effect on the President. Schlesinger looks to the Framers’ intent and the conduct of early Presidents to support his assertion that the imperial presidency is a modern-day phenomenon. “The place to begin,” he says “is Philadelphia in the summer of 1787.”

Schlesinger is measured in his reverence for the Framers, however. He concedes that the Framers were not infallible and that their original intent cannot decide every Constitutional question that may arise, but believes there is still value in examining that intent. He also concedes that the Framers left the division of power in the field of foreign affairs “cryptic, ambiguous, and incomplete.” Notwithstanding the “cryptic” nature of the Framers’ intent for foreign affairs, Schlesinger lists constitutional features that strengthened Congress in this realm: the power to ratify treaties, make appropriations, control immigration, impose tariffs, and to declare war.

Concurrent with this strengthening of the legislature, Schlesinger argues that the Framers set out to render the President less powerful than a monarch by not specifically mentioning him in connection with war-making power. Schlesinger contends that the Framers could have included language allowing the President to declare war with the consent of Congress, or allowing Congress to declare war upon the recommendation of the President. By not doing so, the Framers removed that power from being solely in
the hands of the President. But as this thesis will show, those omissions Schlesinger lists as proof of the Framers’ intent to chasten the President, actually emerged as precedent very early in the republic. While no President has asserted an authority to “declare” a war, many of them have initiated hostilities and asked Congress to support their actions after the fact. This is precisely what happened during the First Barbary War in 1801. And although the Constitution doesn’t stipulate that Congress must wait on the President’s recommendation before declaring war, this is the steadfast process adopted by the national government since the Quasi-War in 1798.

The War Powers Resolution

With the Vietnam War drawing to a close, Congress reasserted its war-powers role. The War Powers Resolution (also known as the War Powers Act) was passed over President Nixon’s veto on November 7, 1973. The stated purpose of the legislation is “to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . . .”

The War Powers Resolution attempts to reign in the executive by placing certain timelines on presidentially directed uses of force. First, the President is required to submit a letter to the Speaker of the House and the President pro tempore of the Senate within 48 hours of sending U.S. troops into conflict. In that letter the President is required to state why the action was necessary, the constitutional or legal authority under which the decision was made, and the scope and expected duration of hostilities. The President is required to remove troops from action within 60 days of notifying Congress unless
Congress had declared war or authorized hostilities, has extended the 60-day deadline, or is physically unable to meet due to the circumstances of war.\textsuperscript{22}

Almost every administration since the passing of the War Powers Resolution has attempted to resist or evade it. President Ford did submit a letter to Congress when he ordered military forces to rescue an American merchant ship seized by Cambodia, citing section 4(a)(1) which triggered the 60-day time limit. This proved an exception to the pattern that would emerge, however. President Reagan determined that his decision to deploy military advisors to El Salvador fell outside of the bounds of the War Powers Resolution and did so without consulting Congress. Later, Reagan deployed marines to Lebanon, notifying Congress but not citing section 4(a)(1) of the War Powers Resolution. Congress later approved an extended timeline for the deployment, anyway.

President George H.W. Bush reported to Congress that he was building up troops in Saudi Arabia as part of Operation DESERT SHIELD, but claimed he needed no authorization from Congress as his actions were pursuant to a U.N. resolution. Congress later authorized the President to commence hostilities if he determined diplomatic efforts had failed. President Clinton ordered several peacekeeping operations in the former Yugoslavia and made reports to Congress “consistent with the war powers resolution.” But Clinton never cited section 4(a)(1), claiming that his actions were in accordance with U.N. resolutions and NATO obligations and presumably beyond the Congressional timeline constraints. Some members of Congress challenged the President in Federal District Court when a deployment of U.S. troops to Kosovo exceeded 60 days. The President argued that the resolution was constitutionally defective. The court ruled in
favor of the President and the U.S. Court of Appeals for the District of Columbia affirmed the decision.  

Less than two days after ordering U.S. forces to assist in the international effort to prevent a massacre in Libya, President Obama notified Congress of his actions. He assured Congress that the U.S. forces were conducting “limited and well-defined” mission aimed at protecting civilians. President Obama wrote that the mission was in the national security interest of the United States and “pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.” While the President cited his actions as consistent with the War Powers Resolution, he made no mention of section 4(a)(1) and no overt acknowledgment that his actions were bound by the 60-day timeframe. When U.S. involvement continued beyond that timeline, the White House claimed that it was not bound by the War Powers resolution because the military was not engaged in hostilities as defined by that act. “In the President's judgment, that the action being taken by the United States in its support role for this NATO mission do not meet the threshold set by the War Powers resolution in the hostilities phrase,” stated White House Press Secretary, Jay Carney.

**Beyond Schlesinger**

Schlesinger’s concerns about the modern imperial presidency have been echoed by countless others in the post-Vietnam era, and many of the pundits concerned with the imperial presidency invoke the intent of the Framers in their critiques. This supposes, however, that a consensus on the subject existed among the Framers. One of the most consulted works of the era, *The Federalist* sends mixed messages about the proper
wartime roles of the President. Other essays from the principal political figures of the
Founding/Framing eras convey different sentiments towards the subject, and often vary
with time among individual writers.

The war-powers language of the Constitution is frustratingly but purposely vague. Both the legislative and execute branches are granted critical war-making authorities. The Framers feared an unrestrained executive at the head of a permanent military establishment with the sole power of initiating war. In an effort to curb the possibility of dictatorship, the ability to raise and fund military forces was granted to Congress, along with the ability to declare war and authorize reprisals. But even by the eighteenth century there was a view that formal declarations of war were arcane, and there was an understanding among the Framers that the President would need the authority to suppress a rebellion or resist a sudden attack.

In *Presidential War Power*, Louis Fisher writes that out of fear of monarchy, Congress transferred the ability to initiate war from the executive to the legislature. At the same time, Fisher notes that states tended to grant their executives broad military power directed towards actions of self-defense and that the Framers recognized the President would require a similar capability. “Clearly these executive powers were directed at defensive operations in response to invasion from the outside or rebellion from the inside,” Fisher explains. But what defines a rebellion? What are the universal agreed upon indicators that an outside attack is imminent? The idea that the war-powers question is answered by the argument that Congress has the sole-ability to initiate war except for in those circumstances where the President deems it necessary to initiate war is
overly simplistic. One man’s (or one party’s) rebellion is another man’s act of civil disobedience. And one President’s response to a perceived outside attack, may be another’s call for restraint and diplomacy.

In a critique of President Clinton’s use of military force, Leonard W. Levy wrote that the Framers intended the President to “control the ceremonial function of representing the nation in its foreign affairs,” and to be “a joint participant in the field of foreign affairs, but not an equal one.” President Washington would have certainly disagreed with Professor Levy given his Neutrality Proclamation of 1793 and his administration’s role in suppressing the Whiskey Rebellion in 1794 (both cases will be examined in Chapters Two and Three). Levy goes on to say that “not even Alexander Hamilton favored an executive power to control foreign policy or decide on war” and that he “envisioned no exalted role for the executive with respect to war and treaty powers.”

This can only be believed if one ignores Hamilton’s *Helvidius* essays, his *Examination No. 1*, various passages in *The Federalist*, and the counsel he provided to Washington during the Whiskey Rebellion. This thesis will examine each of those items in detail and conclude that Hamilton did, in fact, see the need and legality of a vigorous executive in matters of war and foreign policy. Hamilton did not discount the importance of divided power in this matter, but he did not endorse Levy’s interpretation of the President as merely an agent of Congress.

Levy writes that the defenders of the imperial presidency “ascribe to that phrase an inherent authority comparable to the royal prerogatives in matters of foreign policy and making war.” He believes that the Framers intended for the office to be
“fundamentally ministerial in nature and nearly devoid of discretion and leadership.”

Could it be that the Framers were shooting for something in the middle? Appointing the President Commander in Chief of the Army and Navy of the United States would seem an odd gesture from a Convention whose intent was to leave the office devoid of leadership. Also, the separation of purse and sword power, the need for two-thirds of the Senate to approve treaties, and the subjugation of the President to periodic elections and potential impeachment rendered the office something much less powerful than a monarch.

Levy counters that the commander-in-chief clause “imported no grandiose breadth of powers,” but was conferred upon the office so that it could “conduct a war first decided upon by Congress.” But if that were the intent, the earliest Presidential administrations (with the acquiescence of Congress) rapidly departed from that plan. What emerged was a pattern whereby Congress mostly deferred to the executive on the decision to initiate war. The early Militia Acts (which will be examined in Chapter Three) allowed for the executive to call forth armed forces if the judiciary certified that a state of rebellion existed. In that act Congress relented nearly all of its initiation authority.

Congress did authorized hostilities against France during the Quasi-War, but waited for President Adams to request a war declaration. A formal declaration never came, and yet cannonballs flew between American and French frigates. The authorization for the First Tripolitan War came after President Jefferson ordered the navy to engage Tripolitan pirates in the Mediterranean. It’s clear that very early on Congress made the President at least an equal partner and relied upon the Commander in Chief’s leadership in times of conflict.
Later in his essay, Levy allows that Hamilton did support a broader view of executive power in his stance on Washington’s Neutrality Proclamation.

Hamilton was the first to make a sustained argument that the President had plenary authority in the field of foreign affairs and by virtue of an inherent executive power could do whatever he wished to do so long as the Constitution did not clearly limit him.\textsuperscript{32}

Levy claims that while this view of the Presidency was “destined for acceptance” in the twentieth century, it was not accepted at any time before Lincoln. The central aim of this thesis will be to show that the imperial presidency is not, as Levy and others would suggest, a product of twentieth century politics. By taking a detailed looked at the events described above, we will find that an aggressive and clever view of the President’s war-making authorities emerged as the ink was drying on the Constitution.

**In Support of the Imperial President**

The idea that the President has extensive war making authorities is not without its defenders. One of the most celebrated among them in contemporary politics is John Yoo – a professor at the University of California, Berkeley who served in Office of Legal Counsel during the Bush administration. During his time at the Office of Legal Counsel, Yoo wrote an opinion memorandum for the deputy counsel to the president shortly after the September 11\textsuperscript{th} attacks. In that memo, Yoo concludes that the President has “broad constitutional power to use military force,” and that “conducting military hostilities is a central tool for the exercise of the President’s plenary control over the conduct of foreign policy.”\textsuperscript{33}

Yoo cites examples throughout American history in support of this opinion to include President Kennedy’s naval blockade of Cuba, President Clinton’s deployment of
troops to Haiti, and President Jefferson’s orders to the Navy to chastise Barbary corsairs. Yoo references an OLC memo from the Carter White House concerning Iran, which asserted the President’s constitutional power to protect the lives and property of Americans abroad as well understood and a “recurring historic practice which goes back to the time of Jefferson.”

Yoo’s memo also states that Congress has given the President considerable discretion over military force by “establishing and funding a military force that is capable of being projected anywhere around the globe,” and the ability of the President to initiate hostilities is not disputed by the War Powers Resolution. Regardless of what limits the War Powers Resolution my impose, it has no constraint over the President’s authority to determine the amount of force to be used in response to a threat, nor the timing, method, or nature of that response. “These decisions, under our Constitution, are for the President alone to make.”

**Today’s Debate**

The Global War on Terror has exposed the presidency and the nation to a new round of constitutional challenges. Interrogation tactics, detention procedures, and the use of drones are among those issues that have dominated the war-powers debate in the aftermath of the September 11th attacks. But as much as technological advances and an evolving enemy have changed the nature and scope of our concerns, many fundamental aspects of the war-powers debate remain, and there is perhaps no greater example of history repeating itself than that of President Obama’s handling of the recent crisis in Libya.
An Arab Spring-inspired insurrection against the reigning dictator of Libya, Muammar Gaddafi, presented the United States (and its French and British allies) with a chance to depose an old enemy and advance democracy in the region. Operation Odyssey Dawn commenced on March 12, 2011. The operation featured allied fighter strikes and cruise missile launches from American warships with the aim of defeating the regime’s anti-air defenses, and ultimately, at preventing a massacre of Libyan rebels and the civilians supporting them. While several NATO members participated in the operation, the United States lent critical intelligence, surveillance, and logistic support.\(^{36}\)

President Obama, not unlike President Jefferson, consulted his cabinet and military advisors when confronted with the developing crisis in Libya. Congressional consent seemed hardly considered when deciding the timing and extent to which American military personnel should support a rebellion in a foreign land.\(^{37}\) Following in the steps of Jefferson, President Obama decided to commit American forces to action without the prior consent of Congress.

This was, not surprisingly, met with some bipartisan resistance on Capitol Hill. Democratic Congressman Dennis Kucinich even went so far as to suggest that the President’s actions “would appear on its face to be an impeachable offense.” “He didn’t have congressional authorization, he has gone against the Constitution, and that’s got to be said.”\(^{38}\) Democratic Congressman Brad Sherman accused the President of trying “to bring democracy to Libya while shredding the Constitution of the United States.”\(^{39}\) Republican Congressman Jason Chaffetz lamented that the House had “been inept and
irrelevant on the war actions. We have not lived up to our constitutional duty.”

In an editorial for the *National Review*, Kentucky Senator Rand Paul explained his opposition to what he believed to be an unconstitutional war in Libya. “He (President Obama) started another war in Libya, and went further into unconstitutional territory than previous presidents by not even seeking Congressional approval whatsoever.” In step with other critics of the imperial presidency, Senator Paul invoked the Framers’ intent in his rebuke of the President’s actions. “Our Founding Fathers were quite concerned about giving the power to declare war to the executive. They were quite concerned that the executive could rule like a king.”

Skepticism of the President’s decision was not limited to the halls of Congress. In May 2011, George Will wrote a sharp critique of both the President and Congress. “In a bipartisan cascade of hypocrisies, a liberal president, with the collaborative silence of most congressional conservatives, is traducing the War Powers Resolution.” Will called into question the President’s assertion that that the approval deadlines imposed on the executive by the War Powers Act were not hard and fast given that the operation was NATO-led. He also chided congressional conservatives who “preen about their commitment to keeping government on a short leash” but otherwise supported Obama’s Libya policy.

Will had issued a similar critique near the end of the Bush administration, as a confrontation with Iran appeared imminent. Written in November 2007, “Congress’s Unused War Powers” encouraged the legislature to assert its own war powers as defined by the Constitution. Will argued that a Democratic effort in the House to deny funding
for the outfitting of B-2 bombers with bunker busting bombs constituted a dance around the real power of the Congress to prevent war. Congress, claimed Will, “was derelict in their sworn duty” to uphold the Constitution. Will made a familiar complaint about hypocrisy on Capitol Hill, claiming that the Democrats resistance was not based on principle, but “petulance about the current president,” and that Republicans though “supposed defenders of limited government, actually are enablers of an unlimited presidency.”

President Obama’s decision to use military force in Libya had plenty of supporters, however. David B. Rivkin and Lee A. Casey co-authored an opinion piece for the *Washington Post* titled “Why our Libya strikes don’t require congressional approval.” In that column, Rivkin and Casey claim that a President’s role as commander in chief gives him the authority to determine when and how U.S. forces are used. According to the authors, the language of the Constitution “gives the President wide latitude to use military force, subject always to the other limits on his authority inherent in congressional control over the budget, size and existence of the national military.” They make an assessment of congressional hypocrisy on the matter similar to that of Will’s, advising Republicans in Congress who challenged their interpretation to “consider whether they would make the same claims if a Republican were President, as many Democrats previously have done.”

In making their case for broad executive war powers, Rivkin and Casey also attempt to channel the intent of the Framers. They claim that the Framers divided war powers by granting the President discretion over when and how to use the nation’s
military force and granting Congress the ability to determine how much is to be spent on that force in times of war and peace. They also note that the power to declare war, as defined by the Framers, was not equivalent to permitting the use of force:

As a matter of international law, a declaration of war had much more to do with the technical legal regime governing hostilities — dissolving treaties between the belligerent powers and permitting the lawful seizure of public or private enemy property, for example — than with the right to use force in the first place.  

Rivkin and Casey explain that this interpretation of the war-powers language has often led Presidents to commence military operations without the prior consent of Congress. This comes with limits, however. “Certainly at some point, depending on the extent, purpose, and likely duration of hostilities – regime change in Iraq, say – a president must seek congressional approval.” Still, the ability of the executive to initiate hostilities is not antithetical to original intent.

President Obama’s Libya decision also received support (albeit backhanded) from the aforementioned John Yoo. Yoo’s editorial “Antiwar Senator, War-Powers President” endorsed the President’s exercise of war-powers as one “firmly in the tradition of American foreign policy.” Yoo asserts that Obama’s actions were in keeping with Hamilton’s writing in Federalist 74 that the conduct of war should be left to the President as he can act with more secrecy, decision, and dispatch.

Yoo writes that the understanding of “declare war” to mean “start war” comes from a mistaken reading of eighteenth century text. He also notes that the Constitution outlines specific procedures for passing laws, appointing officers, and making treaties, but offers no such procedure for initiating military force. This was not an accident. “The Framers wanted Congress and the president to struggle over war through the political
process, not the courts,” Yoo writes. He also echoes the point that the Framers meant for Congress’s war power to lie in its control of the purse, and credits Congress for ultimately ending U.S. involvement in Vietnam War by cutting off funding. Yoo is critical of President Obama’s decision to seek international approval for his actions, writing that the Constitution granted the executive broad wartime authorities precisely so that such delays could be avoided.

There are, of course, dozens of examples of presidential war-power decisions made throughout the last century that invited claims of constitutional overreach and that could be examined as part of this discussion. The Odyssey Dawn example stands out in its similarity to the First Tripolitan War. I believe it best represents the ever-present tendency of Presidents to adhere to a broad interpretation of their war-power authorities and for Congress to ultimately comply.

What stands out in the contemporary war-powers debate is the ability of both sides to invoke the intent of the Framers in support of their argument. But surely the Framers had a single idea in mind as it pertained to the division war powers – an idea that only one side of the debate could rightfully claim. I don’t believe so. I think the question is left open-ended and that there are a number of reasons why the Framers may have left it this way. Perhaps they were content with the checks already put on the executive branch. Perhaps they themselves were of different minds on the topic and, as Professor Yoo suggests, left future generations to struggle over the issue as a political matter instead of a legal one. Perhaps they left the issue unclear because they were unable to
imagine a scenario whereby the United States would wield a military capacity that was, by an order of magnitude, more powerful than any other that existed on Earth, or a time when a President could unleash that force at any place on the globe at a moment’s notice. In any event, I think it is a mistake to believe that the Framers left us a singular, specific, and unassailable process by which the nation should wage war. A closer look at the writings of the Framing era will show that there was a considerable difference of opinion on the matter. As such, the war-powers debate is better served by examining precedent and the original text as opposed to the invocation of a misremembered history.

The President can only make use of such force as is provided to him by the legislature. In this way, both branches have incredible authority and considerable limitations in their ability to wage war. The authority to initiate war, however, is not clearly defined by the Constitution and arguably lies with both the executive and legislative branches. Even among the principle political figures of the framing era there was a great deal of disagreement on where those boundaries lay.
CHAPTER TWO

With all sides in the war-power debate claiming to represent the original intent of the Constitution, it’s worth examining exactly what the Framers had to say on the issue. The language of the Constitution leaves the matter in doubt. Article 1, Section 8 grants Congress the power to declare war, to issue letters of marque and reprisal, make rules for captures, to raise and support armies (with appropriations not to exceed two years), provide and maintain a navy, make rules for the governing of the military, and to provide for calling forth the militia to suppress insurrections, repel invasions, or to execute the laws of the government.

Article 2 Section 1 vests the executive power of the government in the President, and Section 2 names him Commander in Chief of the army, the navy, and the state militias when they are called into service. And that’s it. There is no language that states when hostilities can be initiated and whether or not one branch is in sole possession of such authority. There is no language defining what constitutes an insurrection or when it should be met with military force. There is no language that suggests a threat to American personnel or property overseas constitutes an invasion. Congress is clearly given power to “declare war,” but is that the same as “start war”? Does a congressional war declaration put the nation in a de facto state of war or a de jure state of war - or both? What if Congress is not in session when such a situation arises? Who has the authority to declare peace as a way of concluding hostilities or forestalling conflict?

The Framers may have left us more questions than answers within the text of the Constitution, but they offered many opinions on the matter in various essays and recorded
debates. It’s clear that during the Framing era there was a great deal of concern about placing too much power into the hands of a central government, especially in an executive. Fresh off a revolution against monarchy, and desirous of a republic, many political figures in the Founding and Framing era feared creating a new tyranny to replace the one from which they had just freed themselves. When the Philadelphia Convention met in the summer of 1787, one of its many tasks was to design an executive branch. No such branch or figure had existed under the Articles of Confederation, but its necessity had become apparent. Still, the Framers were cautious about the nature and scope of power that should be reserved to this branch.

On June 1, the convention debated the topic of executive power. Charles Pinckney of South Carolina worried that granting war and peace powers to the President would “render the Executive a monarchy, of the worst kind, and elective one to wit.”\(^1\) Pinckney supported placing the executive authority in the hands of one man, but would rather the powers of war and peace stay with the legislature. Edmund Randolph of Virginia called for putting all executive power into a three-man council out of fear that a unitary executive would become the “fetus of monarchy.”\(^2\) On June 4, George Mason spoke in favor of a strong executive, but against a unitary one for the same reasons that Randolph had stated. Benjamin Franklin had a more hopeful view of his fellow countrymen, suggesting that not only would there never be a shortage of “wise and good men” able to fill the executive branch, but that they would be willing to do so for free.\(^3\)

On August 6, 1787, the Philadelphia Convention was presented with the first draft of the Constitution. That draft reserved to Congress the power “to make war.” Mr.
Pinckney preferred the power left only to the Senate, which he believed would be better acquainted with foreign affairs and able to act more expeditiously than the House. Pierce Butler, of South Carolina, stated that the power should be left to the President. Butler thought the office better suited to make war and believed a President would only initiate hostilities if he had the nation’s support. Madison and Elbridge Gerry moved to insert “declare” in place of “make,” which would reserve to the President the ability to repel sudden attacks. Gerry added that he “never expected to hear in a republic a motion to empower the executive alone to declare war.” The motion to replace “make” with “declare” passed with 7 states for, 2 against, and 1 abstention. Butler and Gerry then moved to give Congress the power to declare peace, as well. That motion was defeated 10-0.

When the final draft of the Constitution was put to the states for ratification, Patrick Henry took exception to the proposed executive. Henry became one of the most outspoken critics of the new Constitution. At the Virginia ratifying convention, one summer after the Philadelphia convention had adjourned, Henry expressed his concern over the powers granted to the President. Henry worried that state militias would be unable to repel incursions from a federal army, especially given that control of the state militias had been put in the hands of Congress, and by extension, the President. Henry also feared the potential rise of a military establishment: “Some way or another we must be a great and mighty empire, we must have an army, and a navy, and a number of things.” This standing force would render the President even more powerful, he felt.
Contemporary critics of the imperial presidency view the executive as designed by the Framers to be ideal and restrained, but Henry was not so sanguine about the office as it was presented to him. “. . . there is to be a great and mighty President, with very extensive powers; the powers of a King,” Henry proclaimed on June 7, 1788. With an army in his hands, the President could undertake any nefarious endeavor he might desire. He might even attain the power of a monarch. “The President, in the field, at the head of his army, can prescribe the terms on which he shall reign master, so far that it will puzzle any American ever to get his neck from under the galling yoke." While modern day critics of the imperial presidency extol the checks the Framers intended for the executive, Patrick Henry was not convinced of their efficacy.

But, Sir, where is the existing force to punish him? Can he not at the head of his army beat down every opposition? Away with your President, we shall have a King: The army will salute him monarch, your militia will leave you and assist in making him King, and fight against you.

In their collaborative work, *The Federalist*, Alexander Hamilton, James Madison, and John Jay went to work assuaging the fears of antifederalists such as Henry. *The Federalist* makes a thorough case for the necessity of strong national government and the propriety of the Constitution’s language. In so doing, the authors advocate for the executive to have a vigorous role in government to include matters of war and peace. They also made the case that the military force put under his command was both necessary and properly safeguarded. In *Federalist 11*, Hamilton argues that a navy will be needed to protect the nation’s commerce and to put the United States in a position to positively affect the nature of its relationship with the outside world, namely Europe.
Later, in *Federalist 25*, Hamilton argues that it would be foolish to wait for hostilities to commence before raising an army on the premise that elected leaders cannot be trusted with a standing peacetime force.

Hamilton also took an Enlightenment view of the necessity for a professional military. “War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.”\(^\text{11}\) Madison, too, believed a standing military necessary and properly provided for by the Constitution. Madison writes in *Federalist 41* that the legislature could and should be trusted with defense appropriations as they can only be made for two-year periods. In that essay, Madison extols the virtues of a navy, which he believes can provide great safety to the Union and, “happily such can never be turned by a perfidious government against our liberties.”\(^\text{12}\)

But what about the officer who will command this established force? Would he be the man Henry feared – a tyrant in the field at the head of his army? Hamilton and Madison suspected not. Hamilton contests those fears in *Federalist 26*, acknowledging a hereditary Anglo-American fear of standing armies that dated to the 1688 English revolution. But at the time of his writing, he believed those fears were “by an injudicious excess” being extended to the nation’s elected officials. If elected officials could not be trusted with a standing military, then they should not be trusted with any authority, Hamilton claims. As it pertained to the President, Hamilton assured that he was only granted “supreme command and direction” of the military. The President differed from the British Monarch in that the latter had the ability to raise armies *and* declare war (emphasis added), which, under the Constitution, are powers reserved to the legislature.\(^\text{13}\)
If the President were to take to field, as Henry feared, he would only to be able to make use of such force as had been provided to him by an elected legislature.

The President was also subject to several other checks. First and foremost, the President could only serve four years before facing re-election. Hamilton writes in *Federalist 71* that a four-year term provides firmness to the executive, but is not enough time “to justify any alarm for the public liberty.” Hamilton also notes in *Federalist 69* that the President, unlike a British King, would be “liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes and misdemeanors, removed from office.”

In spite of those constraints, it was important for the office of President to be a robust and potent. “. . . it is certainly desirable that the executive should be in a situation to dare act on his own opinion with vigor and decision,” Hamilton writes in *Federalist 71*. The necessity for this, among other reasons, is due to the tendency of legislatures to absorb too much power. Madison writes in *Federalist 51* that each branch required “necessary constitutional means, and personal motives, to resist the encroachments of the others” and that in republican government, where they legislature predominates, the weakness of the executive required that it be fortified. In *Federalist 48*, Madison offers that “a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.” To that end, invigorating the executive would help render each branch of government independent of each other.
With the need for a vigorous and independent executive branch well established, Hamilton writes in *Federalist 74* that this vigorous executive having command of the nation’s armed forces was an arrangement the propriety of which was so evident and in such keeping with precedents set by state constitutions, “that little need to be said to explain or enforce it.” Perhaps no task was better suited to the executive branch than the direction of the nation’s military force.

Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war, implies the direction of the common strength: and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority.¹⁴

**The Case of Publius v. Publius**

Hamilton and Madison may have been on the same page when it came to defending the Constitution as the state conventions put it to trial, but they parted ways in the wake of an historic decision made during the Washington administration. The French Revolution resulted in the displacement of Louis XIV, and put the new French republic on a war footing with Great Britain and other European powers. War fever extended to the United States where Republicans were eager to support France, which they viewed as engaged in a kindred struggle for liberty. Federalists were less enthused with the French cause and supported a closer relationship with Great Britain. The conflict proved to be one the most politically divisive issues of the day.

President Washington had no appetite for entanglement in a European War. On April 22, 1793, Washington issued a neutrality proclamation: “...the duty and interest of the United States require, that they should with sincerity and good faith adopt and pursue
a conduct friendly and impartial towards the Belligerent Powers.” The proclamation also warned American citizens that they risked punishment and forfeiture of their legal rights if they engaged in hostilities against any of the powers involved.

The proclamation outraged Republicans who accused it of being both bad policy and an overreach of presidential authority. They argued that the constitution stipulated that the power to place the nation in either a state of war or peace was reserved strictly to the legislature. They also contended that the United States was bound by law to support France by the 1778 Treaty of Alliance, and ought to be bound by a sense of gratitude for French assistance during the Revolution. Federalists believed that the President was the national government’s chief foreign policy agent, and had the ability to determine the nation’s treaty obligations as he saw fit. Also, as the Treaty of Alliance had been made with King Louis, it was rendered null and void by his overthrow. At the head of these conflicting arguments were the two principal contributors to *The Federalist*: Alexander Hamilton (writing as “Pacificus”) and James Madison (as “Helvidius”).

In *Pacificus I*, Hamilton makes one of his most overt cases for a strong, independent Presidency. First, he refutes the idea that the legislature has more say in foreign policy matters than the President. “The Legislative Department is not the organ of intercourse between the United States and foreign nations. It is charged neither with *making* nor *interpreting* treaties.” Hamilton concludes that the Judiciary can interpret treaties but only within the confines of a litigated case. This is an exceptional circumstance whereby the President alone is qualified to render judgment. Hamilton argues that in executing the law, of which treaties are a part, the President alone has the
“command and application of the public force.” He cites the vesting clause in Article 2 of the Constitution for bestowing that power on the President.

Hamilton does make a qualified concession on executive power. He states that the Constitution puts all executive power in the hands of the President with few exceptions, among those, the power to declare war. However, while the legislature has the ability to declare war, the executive can use his constitutional powers to establish “an antecedent state of things” which should weigh in legislative decisions. Hamilton says that where executive power is divided between branches, what results is a concurrent authority to that power. The legislature alone can transfer the nation from a state of peace to a state of war, Hamilton says, but that power “ought not be extended no further than is essential to its execution,” and it belongs to the President alone to determine what is required by international law and what best serves the foreign policy interests of the United States. Hamilton suggests that if Washington had not proclaimed neutrality, his recognition of the new French government would have obligated the Congress to declare war in faith with the old treaty.

We now have Hamilton on the record twice as acknowledging Congress’s exclusive power to declare war in both Federalist 69 and Pacificus I. Contemporary pundits often cite these remarks in their critiques of the imperial presidency. (“Look, even Hamilton agrees with us!”). But were these just throwaway lines to undercut a Republican counterargument? Was Hamilton acknowledging Congress’s ability to put the nation in a legal state or a de facto state of war? In either case, did Hamilton believe the President was without the authority to initiate hostilities? His Examination essay in
response Jefferson’s first state of the union address and the counsel he provided to Washington during the Whiskey Rebellion would suggest otherwise. Hamilton also undermines the importance of formal war declarations in *Federalist 25*, suggesting that they were “ceremonies” that had “of late fallen into disuse.”

If Hamilton were championing a measured view of executive war power, neither James Madison nor Thomas Jefferson was convinced. Jefferson - who would one day create his own “antecedent state of things” by ordering a squadron of frigates to sail into hostile waters while Congress stood in recess – was outraged by Hamilton’s assertions in the *Pacificus* essays, and implored Madison to respond. Madison took the pen name *Helvidius* and launched a counterattack.

In *Helvidius I*, Madison read Hamilton’s logic to mean that the executive had the authority to judge whether or not the United States was under an obligation to make war. Madison called it “extraordinary doctrine” to believe that treaty making and war making were executive powers, and where not specifically exempted, fell to the President by way of the vesting clause. Madison went on to write that declaring war is not the same as executing the law – it was the act of making a law for the President to follow. Madison argued that to allow one body the power to conduct war and judge whether or not war ought to be made ran counter to republican principles and equated the idea to the royal prerogatives of the British King.

In *Helvidius II*, Madison challenges Hamilton’s claim that the executive and legislative branches hold a concurrent authority over war power. He argues that since the power to declare was an exception of executive power reserved to Congress, then
everything included in that exception should be included in the right. If Congress has the
expressed right to declare war, they also have the exclusive right of discretion over when
to wield that power. He contends that the idea of concurrent authority in any case is a
faulty one. “A concurrent authority in two independent departments to perform the same
function with respect to the same thing, would be as awkward in practice, as it is
unnatural in theory.”

In *Helvidius III*, Madison addresses Hamilton’s claim that Presidential actions
may obligate Congress to declare war. Madison labels this a “towering prerogative.”
There is no Constitutional power by which the President’s can force Congress into a war
declaration, Madison writes. In *Helvidius IV*, Madison warns that if the views offered by
Hamilton make their way into government then there will be no limit to agents of the
government implying power when it suits their interest. He states again that the power to
declare war, including the power to decide the cause of war is exclusively legislative in
nature. He states, “in no part of the constitution is more wisdom found” than in this
arrangement, as “war is in fact the true nurse of executive aggrandizement.” Madison’s
words bear a striking similarity to contemporary concerns levied at the imperial
presidency, but they also ring with some irony when examining the Barbary conflict. His
warning that future politicians might make use of Hamilton’s assertions to accomplish
their goals found no better example than the nation’s first Republican administration.

The Pacificus-Helvidius debate reveals that, even among the Constitution’s
fiercest defenders at the time of ratification, a deep divide existed over what, exactly, the
war-powers language of that document meant. Modern-day pundits are often quick to
reference these men in defense of their position, but their views constitute a considerable ideological range - not the one true doctrine that many believe exists, and that we have allegedly run afoul of. But how could two men with such familiarity of the Constitution have such a marked difference of opinion on one of the most important aspects of that document?

In the introduction to his publication of the Pacificus-Helvidius essays, Morton Frisch states that one of the most remarkable aspects of the Constitution is its unfinished character. “In that uncertain founding, there was considerable debate about the limits of a limited constitution.” The Philadelphia Convention’s decision to replace “make” with “declare” had a limiting effect on congressional war power in that it allowed for the executive to act in certain situations without congressional consent. The floor debates show that the delegates believed this would give the President the power to repel attacks, but they didn’t go so far as to codify such a specific caveat within the language of the Constitution. Congress’s power to grant letters of mark and reprisal also made clear that the nation could conduct military operations less than war. With the language vague, and the Framers in disagreement, the next step is to review early precedents in war power.

In that examination we will find an ideological flexibility among statesmen on the issue of war power that goes to the earliest days of the republic. In his book War Powers of the President and Congress, W. Taylor Reveley recognizes that struggles between the President and Congress over war powers have been a constant since ratification of the Constitution. But the prevailing tendency has been for individuals to interpret the Constitution in a way that supports their views on a case-by-case basis. Thus, pundits and
Congress alike have been more likely to acquiesce to a broader interpretation of
Presidential war power when they support the policy.\textsuperscript{16}
CHAPTER THREE
War Powers and Whiskey

Patrick Henry’s prophecy that a President would take to the field with an army in pursuit of a political objective took little time to materialize. In the fall of 1794, President Washington left Philadelphia at the head of a 13,000-man army – a force larger than any he had commanded during the Revolution. The army marched west, not to repel a foreign threat, but to confront their fellow countrymen. An anti-tax rebellion was in full flush in the western-most counties of Pennsylvania, and President Washington was committed to crushing it. At his side was Treasury Secretary Alexander Hamilton, the leading advocate for a military response to the rebellion against his tax policy. Resistance to Hamilton’s Whiskey Tax was not limited to western Pennsylvania, however, and the actual threat imposed by the Whiskey Rebels was uncertain.

Fortunately, the confrontation was bloodless as the rebellion lost steam before federal troops arrived. But Washington’s actions sent a message to the republic, and to the world, that the authority of the federal government, and specifically, the executive branch, was not to be challenged. A closer look at this episode will reveal that this was in many ways a conflict of choice. The Whiskey Rebellion offered the Federalist administration a chance to enhance its power. In so doing, the Washington administration claimed authority through the Militia Act – an act by which Congress forfeited its war-making discretion in cases of rebellion to the judicial and executive branches.

The whiskey excise tax of 1791 was one of the first fiscal measures passed by the new Congress. The tax was part of Alexander Hamilton’s finance plan for the national government, and would fund interest payments on the national debt that had increased as
state debts from the Revolution were assumed by the federal government. The tax hit those on the frontier particularly hard given the central role that whiskey played in an economy that lacked hard currency. This exacerbated an already tenuous relationship between settlers of the frontier and their government. Those on the frontier felt isolated from their countrymen on the Atlantic coast and believed that the national government did little to protect them from the dangers of frontier life. As such, there was no desire to pay taxes to a distance, and in their minds, an ineffectual capital. There was a belief that those west of the Alleghenies were destined for secession and might in fact be better off if they joined the Spanish or British empires.

This mutual distrust ran all the way to the top. President George Washington had frequent confrontations with frontiersman whose squatted on lands he owned in the west. His travels to the frontier as a young surveyor and soldier left him with a poor impression of frontiersman whom he described as “amongst a parcel of barbarians,” and “as ignorant a set of people as the Indians.” Washington also shared the belief that frontier settlers may be inclined to leave the Union in favor of an alliance with Britain or Spain. This would leave the rest of the United States in a precarious position in the absence of a frontier buffer from Indian attacks, or incursions from those aforementioned empires. These strategic calculations and Washington’s frontier prejudices likely informed his decision-making at the time of the Whiskey Rebellion. Alexander Hamilton’s enthusiasm for tough action against the rebels found a sympathetic audience in Washington.
Excise collectors in western Pennsylvania were met with stiff, sometimes violent, resistance. In September 1791 two collectors were whipped, tarred, and feathered in Washington County. No attempt was made at collecting taxes for nearly a full year thereafter. In the summer of 1792, a house being rented by the region’s chief excise officer was ransacked by an armed mob. By the summer of 1794 the conflict had dramatically escalated. Local militias exchanged gunfire with federal agents and an army of 7,000 rebels threatened to destroy Pittsburgh. These displays sprung from among the most extreme members of the anti-excise movement. Concurrent with these efforts, was a more restrained political resistance to the whiskey tax. Led by area officials such as Albert Gallatin (later named Secretary of the Treasury under Jefferson), these men convened assemblies where they advocated for restraint on the frontier while petitioning the federal government for a repeal of the tax. But many Federalists – Alexander Hamilton chief among them – saw no distinction between these political assemblies and the violence that had erupted on the frontier. In Hamilton’s view, the two were part and parcel of a larger independence movement - a movement he believed needed to be stopped at all costs.

Resistance to the federal tax was not limited to western Pennsylvania, however. Tax collectors were successfully intimated across the frontier from Kentucky to the western Carolinas. Liberty poles were erected in parts of western Maryland as a show of support for the whiskey rebels. In theory, there were a number of places the federal government could have targeted to bring compliance with the law, but western Pennsylvania stood out as a prime opportunity for the federal government to prove itself.
There were several reasons for this. First, while Hamilton briefed the President on all areas of tax resistance, he found Washington less sympathetic to the people of Pennsylvania. This was due in part because Washington believed one of the principal reasons for the whiskey excise was to offset the cost of protecting western Pennsylvania from Indian attacks. If anyone had a duty to comply with the tax, it was those individuals who benefited the most from the revenue it generated. Hamilton advocated for force in western Pennsylvania vice other areas of the frontier for another reason – he thought it most likely to work. Hamilton had calculated the costs and tactical advantages of a campaign in western Pennsylvania and found it most advantageous to a federal response. He believed that if the government succeeded in Pennsylvania, then other areas of the frontier would fall in line. Hamilton also felt that the organized political movement that had developed in Pennsylvania as well as the proximity of the resistance to the federal seat compelled the government to take action.

Washington eventually came to Hamilton’s opinion on the necessity for an armed suppression of the tax rebels. Unlike the enthusiastic Hamilton and despite his frontier prejudices, Washington came to the decision at a measured pace. Washington was concerned for the constitutionality of his actions and was keenly aware of the effect an armed response could have on public opinion. Washington believed that troops must be used to uphold the Constitution, but that they should only be used as a last resort.

On August 2, 1794, Washington called a cabinet meeting to discuss the Whiskey Rebellion. There he agreed to go as far as the Constitution permitted to suppress the rebellion. That meant following the procedures set forth by the Militia Act of 1792. The
Militia Act gave the President two options for dealing with the crisis. Section 1 allows the President to call forth the militias of several states (as many troops as he deems necessary) if an insurrection is taking place upon the approval of that state’s legislature or executive. Section 2 allows the President to consider the situation an obstruction or opposition of the execution of the law. In this case, the President only needs a district judge or an associate justice of the Supreme Court to certify that the situation is beyond the control of the civil authority, at which point he may call forth the militia. The law constituted a remarkable deference of war authority to the President and to the judiciary! The President could rightfully claim that he was compelled to action based on the signature of one associate justice or district judge. The only limit imposed on the President was a requirement to warn prospective rebels and to set a deadline for their surrender before he could take action (a deadline presumably to be determined by the President).

On August 4, Justice James Wilson provided the certification that a state of rebellion existed in western Pennsylvania. With this legal backing Washington embarked on a two-pronged approach. He began military preparations while dispatching a commission to negotiate a peaceful settlement with the rebels. Washington maintained the appearance of desiring a peaceful solution to the conflict but was increasingly convinced that a military response was necessary and inevitable. Between the militias of Virginia, New Jersey, Maryland, and eastern Pennsylvania, Washington had assembled a 12,950-man army to confront the whiskey rebels. Even though it appeared through mediation efforts that the voices of moderation – voices such as Gallatin’s – were
carrying more influence among the tax resistors, federal officials were not convinced that a peaceful solution could be reached. The time for action had arrived. Washington and Hamilton intended to make an example out of the whiskey rebels with the rest of the nation, and the world as their audience.\textsuperscript{13}

Washington joined the army in October at the beginning of the march toward Pennsylvania, splitting time between the southern and northern wings of the army. Patrick Henry’s fears expressed at the Virginia ratifying convention less than a decade earlier appeared to manifest. A sitting President was in the field at the head of army marching against fellow citizens with the object of enhancing the federal government’s power. But by the end of the month, it was becoming clear that an armed conflict was unlikely and that the exercise would result in merely a show of force. Washington turned the army over to General “Light Horse Harry” Lee on October 20, and returned to Philadelphia. Alexander Hamilton remained with the army as the expedition’s unofficial head civilian officer.

By November, the expedition was over. The whiskey rebels had long since lost enthusiasm, having been talked off the ledge by Gallatin and other moderate politicians in the region. Even the most extreme individuals in the movement realized they were no match for an organized force of the size Washington had mustered. The federal army met no resistance when they arrived in the western counties. The army triumphantly returned to Philadelphia that winter with six prisoners in tow. These men were accused of being responsible for inciting unrest in western counties but were quickly pardoned by the President. He and Hamilton had accomplished their goal by demonstrating the national
government’s capacity to use force against a rebellion.

But did Washington do the right thing? James Madison and Thomas Jefferson were predictably skeptical of Washington’s actions. Madison saw Washington’s response as a dangerous trend, writing to James Monroe that “the tendency of insurrections (is) to increase the momentum of power.” In this case Madison feared that the momentum was swinging to the federal government. Jefferson wrote that the call to arms was premature and that the civil authorities should have been given more time to deal with the matter. He and Madison both believed that the Federalists had manipulated the situation to enhance the government’s power. Madison was particularly upset at Washington’s efforts to connect the rise of democratic societies - pseudo-party movements sympathetic to the Republicans and the ideals of the French Revolution - with the whiskey rebellion.

What stands out in the reaction offered by Jefferson and Madison is an apparent omission of any critique of the Militia Act. The act provided the executive with broad war power and few limitations. The power to determine that a rebellion exists (given the concurrence of one member of the judiciary) and to determine what size force should be mustered to quell it is a considerable deference of authority on the part of the legislature. If one accepts the premise that Washington’s response to the Whiskey Rebellion was a founding act in the creation of an “imperial” executive, then it follows that the first session of congress was complicit in that founding by passing the Militia Act.
Adams, Congress, and a Quasi-War

Congress found itself much more active in the prosecution of a limited war fought with the revolutionary government of France between 1798-1800, but still deferred to the President when it came to the matter of a war declaration. The Quasi-War, as it came to be known, began in the aftermath of the infamous “X, Y, Z” affair. The relationship between the United States and France had suffered some setbacks as a result of Washington’s neutrality proclamation and Jay’s Treaty, which ensured peace and established trade relations between the United States and Britain. The revolutionary government of France, known as the Directory, responded by authorizing privateers to raid American merchants. This led to the capture of hundreds of American merchant vessels, mostly in the Caribbean. France did not go so far as to declare war, however. On paper, France remained an ally of the United States and the two nations were officially at peace, but hardline Federalists felt that France’s actions warranted a war declaration. In spite of his partisan leanings, President Adams sought a peaceful reconciliation with France. Adams decided that instead of asking Congress for a declaration of war, he would send a peace delegation to Paris. In the meantime he would authorize American merchants to arm themselves and pursue expansion of the navy in the event negotiations failed. In June 1797, Congress convened in special session and passed legislation providing for an increase in the size of the Navy and for the arming and equipping of an 80,000-man militia. The legislation fell short of what Adams had requested due to the fierce resistance put up by Republicans in the House. Republicans feared that Federalists, under the guiding hand of Alexander Hamilton, were eager to enter into a war
with France. But both Hamilton and Adams proved to be moderate voices among Federalists. Hamilton had hope to avoid a war with France and advocated for a diplomatic solution with caveats. If a peace delegation failed, Hamilton believed the United States should pursue a limited war against France. This way, a full-scale war could be avoided while leaving the door open for further negotiations.  

Adams had also remained committed to peace until March 1798, when dispatches arrived in Philadelphia revealing that French officials had sought bribes from the American envoys and had demanded a loan from the United States in return for peace. Adams forwarded the dispatches to Congress, and in an effort to protect the American envoys, replaced the names of the French officials who had sought bribes with the letters W, X, Y, and Z. In light of the dispatches, Adams believed that a formal war declaration had become a necessity - and many Federalists in Congress agreed.  

Congress wasted little time putting the nation on a war footing while Adams considered whether or not he should request a declaration of war. With Federalist majorities in both the House and Senate, Congress passed a series of legislation which resulted in the creation of the Department of the Navy, an expansion of the naval force, increased funds for coastal forts, and an authorization for the President, at his discretion, to increase the strength of the regular army. In the summer of 1798, Adams signed the first of the Alien and Sedition Acts, which increased the requirements for naturalization, and implemented a regime of censorship and surveillance on foreign residents.  

Adams postponed his decision on a war declaration, however, upon the return of John Marshall who had served as one of the American envoys in Paris. Marshall relayed
to Adams his belief that the French wished to avoid a full-scale war, convincing the President that a peaceful settlement could still be attained. Hardline Federalists in Congress remained committed to a war declaration, but were unable to muster enough votes. Unable to produce the votes for a war declaration, Congress eventually passed an act authorizing the Navy to capture French ships and allowing the President to commission privateers at his discretion. Congress also authorized President Adams to call forth an 80,000-man militia, and put in place the framework for a 50,000-man “Provisional Army.” This army would be called forward if either a full-scale war began, or if the President felt that national security demanded it.²³

It was clear that Congress wanted to respond to French aggression, but lacked the will to legally define their struggle as a war. Members of Congress approached the war declaration question as a political problem more so than a constitutional problem. The country had long been divided on the nature of the American relationship with France and Britain. Republicans were prone to see the French Revolution as a continuation of the American Revolution, while Federalists desired to maintain a close relationship with Britain. Many Americans opposed a war with France even at the height of the Quasi-War.²⁴ With a narrow majority in both chambers, moderate Federalists realized that a war declaration might sweep them from power at the next election cycle. Hardline Federalists, resigned to the fact that a declaration could not be readily obtained, pushed for more legislation increasing defense and authorizing force. This, they calculated, might push France into declaring war at which point Republicans would be forced to vote on a declaration or face their own backlash from the public.²⁵ Thus, the question of a formal
war declaration’s propriety was answered in the play of a political chess game. At the same time, another political game was being played within the Executive branch. Alexander Hamilton - with the political winds at the Federalists’ collective back in light of the X Y Z scandal - was now eager to confront the French. After Adams named George Washington as the head of a provision army, Hamilton succeeded in being named Washington’s second-in-command. This meant Hamilton would be the de facto leader of American forces given Washington’s advanced age. Adams and Hamilton clashed over the size and scope of the nation’s defense force. Adams saw an improved navy as the best means for defense, while Hamilton argued for a large army and suggested that the U.S. could rely on naval protection from Britain. Many Federalists sided with Hamilton, seeing the army as a political instrument to keep them in power. Hamilton and other hardline Federalists also believed that with an army they could seize Louisiana and Spanish Florida in the event of a full-scale war with France. Adams feared Hamilton’s ambitions and as a result “lost much of his enthusiasm for a call to arms against France.”

Although Adams may have lost enthusiasm for a declaration of war and though Congress proved both unable and unwilling to produce one, actual hostilities were taking place. Along the Atlantic Coast from New Jersey to the West Indies, American warships and French privateers were exchanging cannon fire and attempting to capture one another. But in the fall of 1800 another attempt at peace was made. The First Consul government of Napoleon Bonaparte had replaced the Directory in 1799, creating the opportunity for a fresh start in U.S. – French relations.
Adams dispatched a team of envoys to negotiate peace with the new French government that would ultimately prove successful in procuring peace. But before it was known to Adams that a peace deal was at hand, he continued to wrestle over whether or not to ask Congress for a war declaration. In the event that negotiations failed, Adams believed it might be necessary to wage an all-out unlimited war against France. Adams also believed that type of warfare could only be waged if Congress formally declared war. In the meantime, armed vessels from each nation, under the authorization of their respective governments, were fighting each other, and yet, legally speaking, this was not a war.

In an essay written for the *Naval War College Review*, Gregory Fehlings claims that the Quasi-War provided an “historical and legal precedent” which confirmed “the constitutional authority of the United States to wage undeclared, limited war.” Fehlings challenges the notion that America’s participation in limited warfare is confined to the post-World War II era, and points to the Quasi-War as the first of its sort in American history. Fehlings claims that decision made by the Philadelphia Convention to change “make war” to “declare war” gave the President some latitude in defending the nation and conducting war. But by this same decision, it is left “unspecified” as to which branch of government has the to power to make war. Fehlings argues that the language conferring executive power in the President, naming him Commander in Chief of the military, and requiring him to “preserve, protect, and defend the Constitution,” implies that the Framers intended for the President to have the authority to repel attacks not just on the nation’s territory, but on its citizens, possessions, and flagged vessels whether or not
Congress had authorized hostilities.

Fehlings also argues that Congress has the implicit power to authorize limited war inherent in its absolute power to declare war. Congress’s ability to authorize hostilities through legislation gives it discretion over whether or not to wage limited or general war. Specifically enumerated to Congress is the power to grant letters of marque and reprisal. This power allows Congress to arm privateers and authorize them to capture enemy vessels. That this power is listed separately from that of declaring war indicates that the Framers reserved to Congress the ability to conduct “limited hostilities.” As a result, Fehlings writes, “even without declaring war Congress has constitutional authority to defend the republic against a foreign power.” Fehlings states that not only are Congress and the President authorized to act as such, but also are duty bound by the Preamble, which requires the federal government to insure domestic tranquility, to provide for the common defense, and to promote the general welfare.

But what is the difference between limited and declared (or general) war? Fehlings states that the advantage of a declared war is that it “constitutes an unambiguous announcement to the world” that hostile nation’s militaries are committed to each other’s destruction. There is no doubt as to what is about to take place. Fehlings suggests that the Framers had foreign wars in mind when they gave Congress the power to issue formal war declarations, and points to early undeclared wars against American Indians as evidence of that distinction having been made. In the event that Congress authorizes hostilities against a foreign power without issuing a declaration that is to be viewed as a limited war.
Limited wars offer significant advantages over declared (or general) wars. First, they allow Congress or the President the ability to define the scope of the conflict. Second, unlike general wars, they do not put the nation in a legal state of war against the enemy power’s allies. Fehlings writes that these advantages are why we more often see undeclared limited wars than declared general wars, and he reminds the reader of Hamilton’s observation in the *Federalist* that war declarations were falling out of fashion. Fehlings also notes the while Jefferson and Madison opposed the Quasi-War, they both made use of limited war to confront Tripoli and Algiers during their respective presidencies.

This examination of the limited and declared wars is important for two reasons. First, it shows that the initiation of hostilities is not a black or white issue, and that this was equally true today as it was at the time of the Framing and during the earliest years of the republic. Second, and perhaps equally complicating, both the legislature and the executive have the explicit and implicit authority to lead the nation in the conduct of limited hostilities. Again, this is a true today as it was during the Washington, Adams, and Jefferson administrations. So in the absence of clear war power delineations or codified parameters for the conduct of limited war, we are left to examine the precedents set by these earliest administrations and sessions of Congress.

Washington set important precedents for the executive by creating an “antecedent state” through his neutrality proclamation, and by establishing the executive’s right of discretion over when and by what order the government’s force should be applied to an insurrection. The first session of Congress set a precedent of deference in passing the
militia act. That act gave the executive a considerable amount of discretion over how an insurrection could be defined (a rebellion against the government versus a rebellion against the law), and allowed him to call forth a militia of any size he deemed necessary upon the approval of one member of the judiciary.

But Congress went further. In 1795, a revised Militia Act was passed – this time with even fewer checks on the executive. First, the act removed the provision under Section 2, requiring the President to obtain a court order that the state of rebellion was beyond control of the local civil authorities. Second, the act allowed for the President to use militias from other states at all times (previously this was limited to periods when Congress was not in session). Finally, the new Militia Act allowed the President to call forth the militia before issuing notice to rebel forces (this step had previously been required before calling forth troops).32

Washington’s decision to suppress the rebellion in western Pennsylvania was more than a law enforcement exercise. There were real fears the Whiskey Rebellion could morph into an independence movement. Thousands of men appeared at anti-tax assemblies, and later, threatened to destroy the city of Pittsburgh. Washington and Hamilton were expecting armed conflict. But if the Whiskey Rebellion had turned into the Whiskey War, it would have been because the Washington administration chose to make that so. The “public force” could have just as easily been applied to Kentucky, western Virginia, or the Carolinas. Instead of committing to negotiations and a peaceful political solution, Washington chose to fight, and he picked the fight he thought easiest to win. The response to the Whiskey Rebellion was driven entirely by the executive branch,
and suited a Federalist agenda. It enhanced the status of the national government, and by extension, the office of the President.

Adams solidified the war power authorities of the President by using the executive order to arm merchant vessels in the run up to the Quasi-War. It was Adams who ultimately had control over the negotiations with the Directory, and maintained a secret dialogue with the American envoys, which was made public as a result of the “X Y Z” affair. Adams also deferred on the chance to call forth the provisional army. Had he exercised this option, Adams may have escalated tensions between the U.S. and France to a point that could have led to an all-out war. Congress left it to the President alone to determine if and when such a step should be taken. This stands against Levy’s suggestion that the Framers intended for the President to be a mere magistrate and a lesser partner in terms of foreign affairs.

The outcome of the war declaration question also appears to have been firmly in Adams’ hands. Hardline Federalists in Congress were not able to procure a declaration on their own, but it seems likely that had Adams asked, moderate Federalists (and perhaps some Republicans) would have voted for one. In this regard both Adams and Congress were party to the establishment of a precedent that has lasted the life of the country: Congress did not declare war (and has never declared war) without the President’s request. Both branches ultimately approached the war declaration decision with considerations in mind that were political and not necessarily constitutional. President Adams and Congress also proved that the United States had an implicit constitutional capacity to wage limited war, and that there are important roles to be played by both the
executive and legislative branches in such an effort.

The end of the Adams presidency also spelled the beginning of the end of the Federalist Party. Thomas Jefferson and his Republican cohorts were swept into power during the “Revolution of 1800.” But while the days of the Federalist Party were numbered, Federalist views on the executive branch would live on. In fact, perhaps no one did more to advance those views than the nation’s first Republican administration. Thomas Jefferson – the celebrated pacifist and strict constructionist – was about to embark upon one of the greatest military adventures in the nation’s young history. In so doing, Jefferson continued the trend of Presidents taking a broad view of their war making authorities, and Congress would continue the trend of the acquiescing to that practice.
CHAPTER FOUR

In the spring of 1801, four American warships – the Essex, President, Philadelphia, and Enterprise – rendezvoused at Hampton Roads, Virginia on the order of President Thomas Jefferson. The republic’s third Commander in Chief had staged a naval strike force that would avenge his nation’s honor and set a precedent for the exercise of presidential war power. With the support of his cabinet, and without consulting Congress, Jefferson dispatched this “squadron of observation” to the Mediterranean to engage vessels from the pirate regencies of North Africa who “might be at war with the United States.” What followed was a military adventure to rival those of the 20th century: an operation to overthrow an Islamic regime with a mercenary army, supported by American commandos and naval bombardments.

Jefferson’s decision to use force to confront the Barbary problem was made well before he assumed the presidency. The celebrated pacifist had advocated a naval confrontation for 15 years leading up to his Presidency. Jefferson’s pragmatism, nationalism, and sense of justice informed his hawkish approach to the issue of Mediterranean piracy. His position on the matter was remarkably consistent, and his political savvy allowed him to vigorously prosecute the war while staying (or appearing to stay) within the bounds of the Constitution.

The First Barbary War was a foreign policy success story for the Jefferson administration and, ironically, made the same case for the benefits of a vigorous Executive in the conduct of war that many Federalists had made.
Barbary and the West

The pirate regencies of Africa’s Mediterranean coast, known collectively as Barbary, had been raiding European commercial vessels for centuries before the American Revolution. Beginning as early as the twelfth century, the independent state of Morocco, and the semi-autonomous Ottoman client states of Algiers, Tunis, and Tripoli, targeted Western shipping - seizing valuable cargo and selling their captives into slavery.²

Although driven more by economics, the Barbary States invoked Islam to justify their piracy. In 1785, while in London with John Adams, Thomas Jefferson was informed by Tripoli’s ambassador that:

It was written in the Koran, that all Nations who should not have acknowledged their authority were sinners, that it was their right and duty to make war upon whoever they could find and to make Slaves of all they could take as prisoners, and that every Mussulman who should be slain in battle was sure to go to paradise.³

Christopher Hitchens wrote a piece on this episode titled “Jefferson and the Muslim Pirates,” where he suggests that this meeting had implications for Jefferson’s approach to the Barbary pirates years later.

Jefferson would perhaps have been just as eager to send a squadron to put down any Christian piracy that was restraining commerce. But one cannot get around what Jefferson heard when he went with John Adams to wait upon Tripoli’s ambassador to London...it seems likely that Jefferson decided from the moment on that he would make war upon the Barbary kingdoms as soon as he commanded American forces. His two least favorite institutions – enthroned monarchy and state-sponsored religion – were embodied in one target....⁴

Less than a year after that meeting, Tripoli’s ambassador informed Adams that his country “considered itself at war with all Christian nations until a bilateral peace treaty
But these peace treaties came at a price. European powers, to include Great Britain, often paid the pirate fiefdoms annual tributes in exchange for the safe passage of their commerce. The British navy might have easily vanquished the pirate regimes if commanded to do so. Algiers, the largest naval power of the Barbary Coast, possessed only nine battleships and 50 gunboats, which, while significantly larger than the U.S. Navy, paled in comparison to the Britain’s Royal Navy. Collectively, the Barbary powers were “merely a gadfly scarcely worth a broadside, much less a war” from the British. In fact, as Benjamin Franklin observed, “if there were no Algiers, it would be worth England’s while to build one.” British tribute and tolerance of the pirates forced other nations to do the same. France, Spain, Portugal, Denmark, and, as of 1776, the United States of America would have to broker their own deals with the Barbary regents or confront them with force. For the young American republic, there was really little choice.

Raiders from Africa’s northern coast were a known danger to merchants of the New World long before the Revolution. The first documented pirate attack on a North American vessel occurred in 1625, and was followed by a few scattered attacks throughout the 17th century. New York City’s Trinity Church was raised on excess donations made by churchgoers ransoming slaves from Algiers in 1698. But as Britain’s Royal Navy rose to dominance in the 18th century, colonial American merchants enjoyed protection from what had become the most formidable naval force on Earth. This luxury was lost, however, when the colonies declared their independence in 1776 – leaving American shipping especially vulnerable. American trade to the Mediterranean at that
time was not insignificant:

In the years leading to the Revolution, an average of 100 American ships transported 20,000 tons of goods annually to Mediterranean ports. Among the commodities traded there were Southern rice and lumber, grain and flour from the middle colonies, and New England rum and fish. Mediterranean markets consumed one-sixth of America’s wheat exports and one-fourth of its exported fish.\(^{11}\)

The young United States had hoped that the French navy might provide the maritime protection they now lacked. The 1778 Franco-American Treaty of Alliance contained a provision obliging France “to use its best offices to…obtain…the immunity of the ships, citizens, and goods of the United States, against any attack, violence or depredation of…the States of Barbary,” but the French failed to follow through out of a fear that American competition might impact their own commerce in the Mediterranean.\(^{12}\) Barbary corsairs wasted little time targeting the unprotected cargo of American merchants. In July 1785, Algiers captured two American ships, the *Maria* and the *Dauphin*, resulting in the enslavement of twenty-two crewmen.\(^{13}\) The desperate prisoners (now forced laborers who were malnourished and frequently beaten) wrote anxious letters to a man they believed could end their plight – America’s minister plenipotentiary to France, Thomas Jefferson.

**Jefferson and Adams**

Jefferson had tried to act against Barbary before the capture of the *Maria* and *Dauphin*. In 1784, while serving in France, Jefferson tried to arrange an international coalition to blockade the Barbary Coast, but his proposal failed to take hold in the courts of Europe. Congress was equally unmoved by Jefferson’s proposal and instead authorized
a $70,000 bribe to be paid to Algiers. The Dey of Algiers had a much larger sum in mind, however. Ransoming the prisoners alone would cost the United States $60,000 and a peace treaty would cost considerably more. Negotiations with Algiers stalled. At about the same time in early 1786, Tripoli’s ambassador to Great Britain met again with John Adams in London, where he was informed that peace with Tripoli would cost the U.S. £30,000. In a letter to Jefferson, Adams was resigned to the belief that they had no choice but to pay tribute to the pirates. In Adams’ view, it was worth a few hundred thousand dollars in tribute payments to protect “a million annually” in trade with the Mediterranean. Jefferson disagreed:

I acknowledge, I very early thought it would be best to affect a peace through the medium of war. Though it is a question of which we have nothing to do, yet as you propose some discussion of it, I shall trouble you with my reasons…1. Justice is in favor of this opinion. 2. Honor favors it. 3. It will procure us respect in Europe; and respect is a safeguard to interest. 4. It will arm the Federal head with the safest of all the instruments of coercion over its delinquent members, and prevent it from using what would be less safe. I think that so far, you go with me. But in the next steps, we shall differ. 5. I think it least expensive.

Jefferson had calculated that prisoner ransoms and peace payments to the Barbary States would have a total cost of $1.3 million, while for the price of £450,000, the United States could assemble a naval force to confront the pirates. It’s unclear how Jefferson came to those figures, but what was clear was the low-esteem in which he held the naval forces of Barbary. While Adams shared Jefferson’s belief that the U.S. could defeat the Barbary States if wholly committed to the cause, he was much less sanguine about the prospect of congressional support:
Congress will never, or at least not for years, take any such resolution, and in the mean time our trade and honor suffers beyond calculation. We ought not fight them at all unless we determine to fight them forever. This thought, I fear, is too rugged for our people to bear.  

Even if Jefferson and Adams had agreed on the proper course to take regarding the Barbary States, the $70,000 authorized by Congress fell far short of what the Dey of Algiers and the Bashaw of Tripoli required for peace and ransom. With the exception of the treaty with Morocco (freeing the *Betsy* and establishing perpetual peace for a mere $20,000) no deals were reached with the other Barbary States. After negotiating the treaty with Morocco, Jefferson recommended suspending all further negotiations with the Barbary pirates until the United States took action to correct “impotency in the federal government.” The federal government was soon to be strengthened with the ratification of the Constitution, and under the new government Jefferson would serve as the nation’s first Secretary of State.

**A Humiliating Peace**

Despite the failure to negotiate a treaty with the Barbary States (aside from Morocco), the United States caught a break as Portugal went to war with Algiers. This kept Algerian corsairs “bottled up” in the Mediterranean. But when Portugal and Algiers reached a treaty agreement, the United States was again exposed to pirate attacks from that regency. In December 1790, Jefferson wrote a memorandum to Congress recommending that the United States go to war with Algiers.

Instead, Congress authorized $140,000 for tribute, with the task of distributing those bribes falling on the State Department. Although bound to comply, Jefferson
plotted to undermine the policy. His plan was to send Revolutionary War hero John Paul Jones to Algiers with a meager offer of $25,000. When the Dey of Algiers rejected that offer, Jefferson assumed the Congress would then appropriate funds to respond with force. Unfortunately for Jefferson, Jones died before he could be sent to the Mediterranean, and a backup envoy, David Humphreys, would have to go in his place. When Humphreys arrived in Algiers, he found a situation much worse than expected. He discovered that Algiers had captured ten more American vessels and enslaved 110 men. Humphreys was unable to ransom all of the men with the allotted funds and returned to the U.S. empty handed.

The crisis with Algiers was becoming increasingly more expensive. In the absence of a peace treaty with the pirates, American trade in the region ground to a halt and insurance premiums for merchants skyrocketed. The idea of building a navy was finally drawing momentum. On March 10, 1794, after weeks of debate, Congress passed the “Act to Provide a Naval Armament” by a vote of 50-39. The bill authorized the construction or purchase of four 44-gun and two 36-gun frigates (a force deemed appropriate to deal with Algiers). Republicans – mostly opposed to navies on economic and ideological grounds – added a stipulation to the bill: if peace were to be achieved with Algiers, then the construction of the navy would be halted. Only three frigates were completed before a peace deal was agreed to.

In December 1794, American envoys negotiated a treaty that sent $642,500 in ransom to the Dey of Algiers, required annual tribute payments of $21,600 (in the form of masts, powder, shot, and other supplies), and a 36-gun frigate to sweeten the deal. The
total cost of the treaty was nearly a million dollars (amounting to 13 percent of the federal budget) and was ratified by the Senate without debate. Treaties with Tunis and Tripoli followed quickly thereafter. Tunis and Tripoli (unaware of the terms achieved by Algiers) accepted payments of $107,000 and $56,486 respectively. These peace treaties only subjected the U.S. to more humiliation, however.

When the George Washington arrived with Algiers’ annual tribute payment in 1800, the Dey ordered the vessel to transport the Ottoman ambassador and his entourage to Constantinople. When the Washington’s captain resisted, the Dey threatened to open fire on the ship. William Bainbridge, the Washington’s captain, complied with his demand. America’s first warship to sail to the Mediterranean undertook this humiliating task not under the Stars and Stripes, but under the Crescent of Algiers. America’s arrangement with Tunis and Tripoli, while not requiring annual tribute payments, did require that annual gifts. When the Bashaw of Tripoli learned of the George Washington incident and what Algiers had received in their deal, he demanded an additional $100,000 and a frigate of his own.

The peace treaties with Barbary, as Jefferson suspected, only bought the United States continued bullying. The election of 1800 would profoundly change that dynamic, however. The nation’s third president had been hawkish on the pirate issue from the moment he confronted it fifteen years prior. The man who declared himself “an enemy to all these douceurs, tributes and humiliations,” was now the Commander in Chief of the American military. At long last, Jefferson would get his war with Barbary pirates.
To the Shores of Tripoli

Within a month of his inauguration Jefferson ordered a squadron to rendezvous at Hampton Roads and to make itself ready for deployment. Congress went into recess shortly after Jefferson’s inauguration without having been consulted on a possible military expedition to the Mediterranean. Instead of requesting Congress to stay in Washington to authorize the use of force or calling Congress back into session after they had adjourned, Jefferson called a meeting of his cabinet on May 15, 1801. The consensus of the meeting was that the President did not need the permission of Congress to deploy naval forces, so long as they were conducting defensive operations. It was agreed that the squadron should be deployed as a “squadron of observation,” but if it was found that a state of war existed then the squadron’s commander, Commodore Dale, was authorized to “protect our commerce and chastise their insolence by sinking, burning, or destroying their ships and vessels wherever they should be found.” Commodore Dale would in fact discover that the pirate fiefdom of Tripoli considered itself at war with the United States. A day before Jefferson’s cabinet meeting in Washington, Yussef Karamanli, the Bashaw of Tripoli, sent troops to the American consulate to chop down its flagpole – a symbolic gesture that Tripoli was at war with the United States.

The first American squadron deployed to the Mediterranean experienced a relatively uneventful cruise. Poor weather and shallow reefs made it difficult for Dale’s squadron to effectively blockade Tripoli’s harbor. Dale elected to provide escort for American merchant vessels instead of blockading the harbor. The deployment saw only one engagement, but it would be an important one. The *Enterprise*, commanded by
Lieutenant Andrew Sterett, soundly defeated a pirate corsair, the *Tripoli*, while on a fresh-water replenishment run to Malta. Sterett was under orders to quickly return to the squadron after taking on fresh supplies and to not go out of his way to engage the enemy. Sterett’s crew disarmed the defeated cruiser by throwing its cannons and shot overboard and sending her back to Tripoli. Operational constraints prevented Sterett from keeping the ship as a prize, but he also reported that he did not believe such an act was authorized, as the United States was not officially at war with Tripoli.  

Jefferson seemed to agree, or at the very least, Sterett’s reasoning provided him with an illustration of how the expedition was being conducted within the boundaries Constitution. In his “First Annual Message” to Congress – what we know today as a State of the Union address – Jefferson informed the members of the House and Senate of the actions taken against Tripoli.

Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war, on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean, with assurances to the that power of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack.

Jefferson went on to justify his action by calling attention to the fact that American shipping in the Mediterranean had been blockaded, that ships elsewhere within the Atlantic were potentially at risk, and that the Bashaw of Tripoli had already declared war in form and had cruisers out of port. He then recognized the bravery of Lieutenant Sterett and his crew, citing it as “a testimony to the world that is not the want of that virtue which makes us seek their peace, but a conscientious desire to direct the energies
of our nation to the multiplication of the human race, and not to its destruction.\textsuperscript{33}

Jefferson followed that high praise by explaining why Sterett’s actions - and subsequently his own - were within the bounds of the Constitution. He explained that without a sanction from Congress, American warships were not permitted to go “beyond the line of defense.” Thus, once the enemy vessel was disabled, Sterett was within the confines of the law to liberate the enemy crew. Jefferson asked Congress to consider authorizing offensive measure so that “our force will be placed on equal footing with that of its adversary.”

But did Jefferson really believe that this was a defensive operation? Or was this a spin message aimed at softening the blow to a newly-arrived Congress, especially given that the current state of hostilities were now several months along and had escalated into a shooting war? In either case, by ordering Dale’s expedition to the Mediterranean, Jefferson had created what Hamilton (as Pacificus) had earlier referred to as an antecedent state that would weigh heavily on future acts of Congress. But where Pacificus might have approved of Jefferson’s action, Lucius Crassus took issue with Jefferson’s words. In his \textit{Examination No. 1}, Hamilton assumed the pen name Lucius Crassus to attack the substance of Jefferson’s state of the union remarks on Lieutenant Sterett’s engagement. Hamilton called it a “surprise” to learn that although Tripoli had declared war in form and enforced it with actual hostilities against the United States, a sanction of Congress was required to authorize the capture of Tripolitan vessels.\textsuperscript{34} Hamilton called it “the most singular paradoxes ever advanced” that between two nations there could exist a state of war on one side and a state of peace on another. It is the rule of
natural law, Hamilton wrote, that once one nation commences war on the other, both nations are in a state of war regardless of the other nation’s actions. This applies to both limited and general warfare. Hamilton argued that there was nothing in the Constitution that would prevent the President from ordering the capture of enemy vessels if that enemy had already declared war on the U.S. “The framers of it (the Constitution) would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and inconvenience.” Hamilton makes an even bolder assertion: while Congress has the unique ability to remove the nation from a state of peace to a state of war, if a foreign power declares war on the United States first, then such a motion is “nugatory” as the nation is already at war.

Hamilton also challenged the notion that is was within the President’s authority to order the killing of enemy combatants on one hand, but beyond his authority without congressional approval to order the milder action of seizing enemy ships on the other. “The doctrine of the Message (Jefferson’s address) includes the strange absurdity, that, without a declaration of war by Congress, our public force may destroy the life, but may not restrain the liberty, or seize the property of an enemy.” Hamilton then presented the following scenario: what if, while Congress was not in session, a foreign power declared war on the United States and sent a fleet to the coast of Rhode Island? Would the President be able to order a counterattack, but be forced to wait for Congress to reconvene and declare war before he could authorize the capture of enemy vessels? In the meantime both ships and crew would be lost to the enemy where they would surely be rearmed and returned to battle. Hamilton declared that the world laugh at the U.S. if that
were the only power of its chief magistrate in a time of war.\textsuperscript{37}

Hamilton’s blistering attack on Jefferson’s address followed a line of logic strikingly similar to what Albert Gallatin had offered in that initial cabinet meeting. When Jefferson put the question of Barbary to the Cabinet, it was Gallatin who assured the President he could take action without Congress’s permission. “. . . to declare war and to make war is synonymous. The Executive cannot put us in a state of war, but if we be put into that state either by the declaration of Congress or of the other nations, the command and direction of the public force belongs to the Executive.”\textsuperscript{38} Secretary of the Navy, Robert Smith, concurred with this assessment: “. . . if a nation commences war, the Executive is bound to apply the public force to defend the country.”\textsuperscript{39}

Jefferson’s cabinet voted unanimously to allow the squadron to sail for the Mediterranean, while only one member voted against allowing the squadron to search for and destroy enemy vessels. This seems a remarkable moment in war-power politics. The staunchly Republican Albert Gallatin was telling Jefferson what he wanted to hear – a very Federalist idea on how the executive could wield the public force. Alexander Hamilton, Albert Gallatin, and Thomas Jefferson now seemed aligned on the war-powers question. Jefferson was feigning restraint in his message to Congress – he had already authorized hostilities and was committed to seeing it through.

In \textit{Thomas Jefferson: The Art of Power}, Jon Meacham cites Jefferson’s conduct in the initiation of the Barbary War as an example of his prowess as a political chess player. By ordering Commodore Dale’s squadron to search and destroy enemy vessels, it was Jefferson, not Congress, who was ultimately responsible for the commencement of
offensive measures. “Here Jefferson was effectively exerting control over the military and foreign policy while appearing to defer to the legislature. It was typical Jefferson: having his way without precipitating confrontation or a distracting crisis.”

One week after Jefferson’s address, Congress passed a joint resolution recognizing Lieutenant Sterett’s “nautical skill and gallant conduct,” and awarded his crew an additional month’s pay for their success in disarming the Tripoli. Both the House and Senate now turned their attention toward the issue of authorizing hostilities against Tripoli. The House took up debate on the following resolution: “That it is expedient that the President be authorized by law, further and more effectually to protect the commerce of the United States against the Barbary Powers.” Congressman Nicholson argued that the words “further and more” should be removed from the resolution as they could be read to allow the President to increase the naval force at his discretion. Nicholson felt that the House was uninformed as to the necessity of increasing naval forces and should not commit to such broad language.

Congressman Giles supported the original language of the resolution. Giles said that he was not in support of increasing the size of the military, but he did not read the words “further and more” to mean that the President would have that authority. Giles believed the language of the resolution did not apply to the size of the force the President could employ, but to the range of measures he could take. Congressman Smith agreed with Congressman Giles’ assessment of the resolution’s language. Smith went on to say the United States was “at war” with Tripoli and Congress should consider that Algiers and Tunis might also become hostile towards the U.S., and that it may be necessary to
authorize the President to act should that occur.\textsuperscript{43} Congressman Mitchell suggested that the resolution be change to authorize the President by law to act “if necessary,” rendering the act conditional.\textsuperscript{44} Nicholson disagreed with Mitchell’s proposal, arguing that by adopting it, Congress would have done nothing at all. Congressman Eustis said that he considered the act a matter of allowing the President to go beyond the defensive measures already taken.

In January 1802, the House resumed debate on the authorization. Congressman Bayard, thought that Congress should go a step further and allow the President to “grant letters of marque and reprisal” against Tunis and Algiers if it became necessary. Bayard thought that this preemptive authorization was necessary since, given the similarities of the Barbary States, “they may be brought into the war with Tripoli against us.”\textsuperscript{45} He then claimed that since the Barbary States were more “perfidious” than other “civilized nations,” he wished it left to the President to exercise the powers vested in him to do whatever he thought proper.\textsuperscript{46} Bayard’s amendment was not added to the authorization legislation, but his floor debate is important because it reveals that just thirteen years into the republic, there was a belief that, given the circumstances of the case, the President should be given broad discretion over the use of force. Bayard was prepared to let Jefferson expand the war to other nations when or if he chose to do so. In time, the rest of Congress would be prepared to do the same.

On February 1, 1802, Congress passed “An act for the protection of the commerce and seaman of the United States in the Mediterranean and adjoining seas.” A motion was made to add to the preamble of that bill the following words: “whereby a state of war
now exists with the said Regency (Tripoli).” That motion was defeated.

Although short of a declaration of war, the bill did grant the President sweeping powers.

The legislation allowed Jefferson “to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require.”

Additionally, American warships could now capture enemy vessels and the President could utilize as many armed ships as he deemed necessary. In an article for the Virginia Magazine of History and Biography, David A. Carson wrote that from that moment on, Congress never attempted to gain control over America’s relationship with the Barbary powers.

“Congress,” Meacham writes, “fell into Jefferson’s hands, essentially retroactively approving the orders to Dale and granting the president even wider authority in the wake of the Sterett action.”

Empowered by this legislation, Jefferson sent a relief squadron including the frigates Constellation and Chesapeake under the command of Commodore Robert Morris. Morris was recalled within six months due to his “long and leisurely” port calls and general lack of urgency in engaging Tripolitan vessels.

The third Commodore, Edward Preble, did not lack for zeal. Leaving Boston aboard the Constitution in May 1803, Preble - an enthusiastic commander and strict disciplinarian - was bent on taking the fight to Tripoli. Early on the deployment, however, his squadron was dealt a jarring setback. The Philadelphia, commanded by William Bainbridge – the unfortunate captain who years before had been forced to run an errand for the Dey of Algiers – ran aground on a shallow shoal near Tripoli’s harbor. Without firing a shot, Bainbridge struck his colors and surrendered his ship to boarding pirates. The Bashaw now had a huge

Edward Preble would not allow the Philadelphia to become a pirate ship, however. In what Lord Horatio Nelson called “the most daring act of the age,” Lieutenant Stephen Decatur, on Preble’s order, led a team of volunteers on a nighttime raid to destroy the captured vessel (now moored in Tripoli’s inner harbor). Disguised as local sailors in a captured schooner, Decatur’s men made fast to the Philadelphia and sprang their trap. They quickly dispatched the pirate occupiers on board, set long-fused charges to the ship’s munitions spaces, and escaped to their schooner before the Philadelphia exploded. The act would prove to be a huge morale boost for Bainbridge’s imprisoned crew, and enshrined Stephen Decatur as an American naval hero. The mission enraged the Bashaw of Tripoli who set a new price for peace with the U.S. and the ransom of the Philadelphia’s crew: $1,000,000.

News of the Philadelphia’s capture reached Washington in March 1804, prompting Jefferson to ask Congress for more support. “This accident renders it expedient to increase out force, and enlarge our expenses in the Mediterranean, beyond what the last appropriation for naval service contemplated.” Congress responded with “an Act Further to protect the commerce and seamen of the United States against the Barbary Powers,” which gave Jefferson even more authority and better funding. The act levied a 2.5 percent tax on imports, which would be directed into the “Mediterranean Fund.” The President could use this fund to continue deploying warships to the Mediterranean, and for “carrying on warlike operations against the Regency of Tripoli or any other of the Barbary Powers, which may commit hostilities against the United States
With that provision, Congress fully adopted Bayard’s proposal from two years prior by giving Jefferson the preemptive authority to wage war on Algiers and Tunis.

In the fall of 1804, Commodore Samuel Barron set sail with another squadron to relieve Commodore Preble. Embarked with Barron were William Eaton and a small team of marines. Eaton – who had previously served as an army officer and consul to Tunis – had long advocated for a commitment of troops to the conflict with Tripoli and over the course of his time in Tunis, he came to believe that the Bashaw of Tripoli could be easily deposed. In June 1804, Jefferson and Eaton met in secret, presumably to discuss a plan to overthrow the Bashaw and replace him with his exiled brother, Hamet. There are no recorded minutes of this meeting, but Eaton left Washington with 1,000 muskets, a $20,000 budget, and nine marines. He arrived in Egypt that fall, raised a rag-tag army of mercenaries in Alexandria, and marched them across the desert to the city of Derne in western Tripoli. Along the way, Eaton recruited men from nomadic Bedouin tribes to augment his force. On April 27, 1805, Eaton and his men attacked Derne from the east while four American warships provided gun support from the sea. The city fell that afternoon and for the first time in history, the American flag had been planted on hostile foreign soil.

Eaton spent the next several weeks defending the city from counterattacks while waiting for orders. Concurrent with Eaton’s expedition, the U.S. consul general to the Mediterranean, Tobias Lear, was working a diplomatic resolution to the conflict. Jefferson had authorized both approaches – Lear’s publicly and Eaton’s privately. Due to
the constraints of the time, it was impossible for the White House to know how either approach was going in real time. But Jefferson made clear that he would not pay a ransom as part of a peace deal and was content to continue military operations, even if it meant simply maintaining the blockade. After Lear left Malta to begin negotiations in Tripoli, a new shipment of military supplies arrived along with a message from Navy Secretary Robert Smith that more gunboats and sailors were on the way.60

It was becoming clear to the Bashaw that the United States would not relent. With his brother at the head of an army in the east and the U.S. Navy continually bombarding his capital, Yussef Karamanli was ready to negotiate. With a peace deal imminent and the $20,000 budget for the coup project exhausted, Commodore Barron ordered Eaton to suspend operations. Eaton was forced to abandon the regime-change mission, Derne, and most of the men that had fought with him – with the exception of the Hamet and the marines. On June 4, 1805, the Bashaw agreed to a peace treaty. The United States would pay the Bashaw a $60,000 tribute and withdraw Eaton and Hamet from Derne in exchange for a release of the Philadelphia’s crew and the promise that Tripoli would stop pirating American merchants.61 The Senate ratified the treaty two months later, ending America’s first foreign intervention.

Eaton returned from his aborted mission to a hero’s welcome. Jefferson credited Eaton’s efforts for bringing about a conclusion to “our warfare with that state (Tripoli)” in his third annual message to Congress.62 But Eaton remained adamant that he could have went further - placing Hamet on the throne and negating the need for a peace treaty with the Bashaw. Federalists in Congress took the same position. A committee was
assigned to determine what aid Hamet Karmanli should be awarded in the aftermath of the abandoned coup attempt. They issued a report highly critical of Lear’s handling of the negotiations and the decision to end Eaton’s mission. The committee also proposed a bill for the relief of Hamet, leaving it to Congress to decide how much compensation he should receive.63

On January 13, 1806, Jefferson submitted a special message to Congress summarizing his involvement in the Hamet project. Either motivated by frugality or an effort to keep up an appearance of executive restraint, Jefferson distanced himself from any promises that might have been made to Hamet.

We considered that concerted operations by those who have a common enemy were entirely justifiable, and might produce effects favorable to both without binding either to guarantee the objects of the other . . . we authorized Commodore Barron, then proceeding with his squadron, to enter into an understanding with Hamet if he should deem it useful; and as it was represented that he would need some aids of arms and ammunition, and even of money, he was authorized to furnish them to a moderate extent . . . our expectation was that an intercourse should be kept up between the ex-Bashaw and the commodore; that while the former moved on by land our squadron should proceed with equal pace . . . . 64

Jefferson then blamed Hamet for the mission falling short.

In the event it was found that after placing the ex-Bashaw in possession of Derne, one of the most important cities and provinces in the country, where he himself had resided as governor, he was totally unable to command any resources or to bear any part in cooperation with us. This hope was then at an end, and we certainly had never contemplated, nor were we prepared, to land an army of our own, or to raise, pay, or subsist an army of Arabs to march from Derne to Tripoli and to carry on a land war at such distance from our resources.65

Finally, Jefferson disowned his role in the plot to overthrow the Bashaw and claimed that the U.S. government owed only to Hamet to restore him to his original condition before the expedition.
Should it be thought by any of that the verbal instructions said to have been given by Commodore Barron to Mr. Eaton amount to a stipulation that the United States should place Hamet Karamanli on the throne of Tripoli – a stipulation so entirely unauthorized, so far beyond our views, and so onerous could not be sanctioned by our Government . . . .

Jefferson had created this plausible deniability on the regime-change scheme by keeping his meeting with Eaton private, and by providing concurrent public authorizations for Lear to forge a peace and Barron to keep up the fight. Jefferson’s claim that communication limitations left him unable to direct the specific outcome of the situation in Tripoli is allowable. But his claim that regime change went beyond what he believed to be authorized is a remarkable piece of political spin. The U.S. government may not have been obliged to put Hamet on the throne, but it certainly attempted to do so under Jefferson administration’s authorization and allocation of funds. Jefferson claimed that the U.S. was in no position to commit more troops or money to continuing the mission from Derne to Tripoli, but while Lear negotiated with Yussef, more gunboats, more sailors, more shot, and more powder were on the way to Barbary. Had Jefferson known the outcome in Derne, it seems likely he would have authorized more money for the Eaton’s expedition given his tacit endorsement of the plot and his unconcealed funding of the project.

**Emperor Jefferson?**

From his time as the ambassador through his presidency, Jefferson was consistent in his belief that the Barbary pirates must be confronted with force. When Jefferson got
the chance to put this policy into action he set important precedents for executive war powers along the way. Experience had taught Jefferson that Congress lacked the will to initiate a confrontation with the Barbary States - he would have to do it alone. Deploying a “squadron of observation” was a move of political genius. If a state of war existed (as was found to be the case), then Jefferson would have naval assets in place to stand up to Tripoli, but could claim them to be defensive in nature.

Jefferson made himself the prime mover in commencing hostilities while making the claim that his actions were constitutional. The last clause of section 2 of the “Act for the protection of the Commerce and Seaman of the United States against the Tripolitan cruisers,” allowed Jefferson “to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require.” By that provision, Congress deferred almost all of its authority to the President. Jefferson took advantage of this latitude to authorize the use of covert operatives to overthrow a sovereign government and allocated money for this operation, again, without consulting Congress.

If Jefferson were in the White House today, he would undoubtedly endure the accusations of being an imperial President. Jefferson and Madison may have had misgivings about getting involved in covert king-making campaigns, but their actions were not so dissimilar to those taken by the U.S. throughout the twentieth century. Even Schlesinger - the man who wrote the book on the imperial presidency - acquired a more sober view of Jefferson upon further reflection on the Barbary War. In 1973, Schlesinger praised Jefferson as a model for executive restraint, but in his 2004 work War and the
American Presidency, Schlesinger cites the Barbary War as an example of “presidential adventurism,” and one in which Jefferson misled Congress. 70

Jefferson’s conduct of the Barbary War was not an anomaly of the time. There are many comparisons that could be made between the Barbary War and present-day conflicts, but there are also many parallels between the Barbary War and the Whiskey Rebellion. Washington and Jefferson both picked fights that were optional: Washington could have let Pennsylvania officials handle the rebellion or pursued serious negotiations with the moderate politicians in the area who were gaining influence; Jefferson could have ransomed American prisoners and continued the payment of tribute to Barbary. Both men picked fights they thought they would win: Washington (under Hamilton’s counsel) thought western Pennsylvania a theater best suited to a Federal victory or at least most deserving of a response; and Jefferson had long believed that the Barbary pirates could be subdued with a modest but dedicated use of force. But the Barbary War stands out in that a Republican President adopted a Federalist view of the executive’s war-making authorities. Now both parties had advanced the concept that the President had broad war powers.
CONCLUSION

The Framers of our Constitution were brilliant men. They left us with a system of government that has led to two centuries of prosperity, and which has served as a model for emerging democracies. The Constitution is a revered document – our rights, our laws, and a large part of our national identity are found in its words. But the Constitution, while perhaps close, is not a perfect document – it could not have been.

In the final Federalist essay Hamilton writes, “I never expect to see perfect work from imperfect man.” It didn’t take long for the Framers to realize that their system of government would be shaped by trial and error as much as by the language of the Constitution. The very men who wrote the document soon found themselves in disagreement about what it said. On the question of legislative and executive war authorities, very little had been written in the Constitution at all. But as the young nation faced various threats, the executive branch assumed a larger role in the conduct of war, to include initiating hostilities. Presidents took a broad view of their authorities as Commander in Chief and Congress consented to this state of becoming - and this happened in relatively short order.

This thesis focused on the Washington, Adams, and Jefferson administrations because these administrations were not far removed from the Framing and each of them, in unique ways, set important and lasting precedents for the use of presidential war power. It’s not just that a sitting President called forth the militia and marched it against American citizens. It’s not just that a President assumed a central role in the war declaration process when confronting a world power. It’s not just that a President took on a pet project to overthrow an unfriendly regime, and initiated that conflict without prior
congressional consent. It’s that all of those things happened within the first 16 years of the republic, and the men that presided over those events were either closely acquainted with the Constitution or involved in its framing. For an era that is looked to with such fondness by those who believe we’ve lost our way, it seems to me to be an era of vigorous – what some today would likely call “imperial” – executive action.

What is also remarkable about this period is the role Congress played in allowing this to occur. Washington was able to muster an armed force by invoking his power under the Militia Act of 1792. This act deferred judgment to the President as to what constituted an insurrection and what size force was needed to suppress it. The few checks on executive power found in that legislation – the requirement for a court order certifying rebellion, the requirement for a warning to be issued before the militia was called forth, and the limitation on using militia from outside states only during periods when Congress was not in session – were all removed by the Militia Act of 1795. This came after a President had invoked the act to pursue what some believed to be an unnecessary conflict inspired by partisan ideals.

Congress’s enumerated power to declare war is often cited as the ultimate indicator of original intent. Some have even suggested that Congress was meant to be the leading body in all foreign policy with the President serving as a lesser partner – a mere magistrate to carry forward that policy. But the conduct of John Adams during the Quasi-War stands in stark contrast to that reading of original intent. Adams had clear control over the negotiation process with France and on the outcome of the war declaration question. Adams and Congress established a model for waging limited war.
Congress’s inability and unwillingness to offer a declaration of war without the President’s request established a lasting precedent in American government. It also raised the President, beyond a shadow of doubt, to level equal to or above that of the legislature in terms of foreign policy and war power. Where Congress lacked the will to declare war on their own, they deferred to the President by authorizing him, at his discretion, to arm merchant ships and to call forth an army whenever he saw fit. This was no small thing. If Adams had made full use of the powers authorized to him, he may very well have escalated the conflict to a state of general war. By calling forth an 80,000-man militia and a 50,000-man army, as Congress made his prerogative, France may have felt threatened into declaring war. Thus, Adams could have created that antecedent state that Hamilton claimed as an executive right in the Pacificus essays. In that case, the antecedent state would have almost certainly resulted in Congress declaring war.

Adams and Congress both approached the conflict with France as a political matter first and foremost. Not that the Constitution was disregarded, but it was almost an afterthought. Although many Federalists desired a war declaration, the moderates in that party realized that doing so could jeopardize their thin majorities in the House and Senate. Authorizing the President to conduct limited hostilities may have pushed France over the brink, putting Republicans on their political heels. Adams feared the extreme elements from within his own party, which desired a large standing army and reliance on the British navy. Federalists in the Hamilton camp believed the Quasi-War could be used as a pretext for seizing Louisiana, driving the Spanish from Florida, and strengthening the Federalist party. These ideas gave Adams pause, and ultimately led him to avoiding a
general war. Although he struggled, Adams never lost control of the conflict’s direction.

The size and scope of American action in the Quasi-War was ultimately the President’s decision. Even in a limited war – which some have suggested are to be conducted by Congress – the President held the reins. President Jefferson not only held the reins of the next limited war, his administration ran the entire operation with only a feigned regard for Congress. The First Barbary War, like the Quasi-War, was an undeclared one. Jefferson, just weeks after Congress left Washington, ordered a squadron of frigates to the Mediterranean on a “defensive” operation. If the Navy were to find that a hostile state existed, they were allowed to harass, pursue, and destroy Tripolitan ships. Jefferson found support for this action within his cabinet, which assured him that he did not need Congress’s permission to wage defensive war.

Jefferson must have known that the deployment would result in increased hostilities. He had a history with the Barbary pirates and had long advocated for the United States to pursue a military campaign against them. By sending the Navy into a hostile situation to look for a shooting war with Tripoli, Jefferson acted first and asked Congress later. If a state of war were found to exist, then Congress would have to act. In creating his own “antecedent state,” Jefferson had taken a page out of the Alexander Hamilton executive playbook.

I believe Jefferson’s actions were necessary given the history of Barbary attacks on American shipping. But he had other options: pay the pirates a tribute, ransom American captives, abandon Mediterranean trade, etc. Washington and Adams had previously, and every European power of the time was currently paying the Barbary...
states a tribute to protect their merchants. A military confrontation was a pet project of Jefferson’s and Congress became a willing and enabling partner. First, as Jon Meacham points out in his Jefferson biography, Congress retroactively authorized the hostilities Jefferson had already commenced. Second, they provided the funding for Jefferson to conduct his war as best he saw fit. Again, congressional deference to the executive, even in limited war, ruled the day.

Jefferson made full use of the latitude provided to him by Congress. What began as several rounds of blockades and scattered naval engagements escalated to a full-scale attempt at regime change. President Jefferson and Secretary of State Madison – champions of restrained government – oversaw a covert operation meant to drive the ruler of a sovereign nation from power. American troops were sent to train a mercenary force to install a government that would support American interests in the region. For the first time in history, the American flag would be raised over foreign soil following victory in battle. And although this plan to overthrow the Tripolitan regime ultimately fell short, it allowed the United States to achieve an honorable peace and won the return of American prisoners. When the details of Jefferson’s war became public, there were no cries of overreach or imperial drift. Most of the criticism from Congress was based on the belief that Jefferson didn’t go far enough.

If there were going to be a moment in the early republic when the rise of a vigorous war-power President might have slowed or stopped, one would have expected it to occur with Jefferson’s election. But that didn’t happen. The political anti-Hamilton, Jefferson assumed a very Hamiltonian attitude to war powers. As a master politician,
Jefferson made sure to feign deference to Congress, but the reality of his actions suggest he was intent making the Constitution fit his agenda and not the other way around. In projecting power to foreign shores, creating a national tax in the Mediterranean Fund, and providing through policy for the emergence of American military heroes, Jefferson was forging a national identity – not a Republican or Federalist one.¹

Why does any of this matter? I believe a real understanding of the war power relationship forged in this era is critical to understanding our current state of affairs. There has been an increased tendency to look to the Framing era for wisdom. There exists an idea that things were once pure. That real republican government once existed in a way that it does not now. I don’t think that’s true. And I think it’s damaging to our current discourse, especially as it pertains to the war powers question.

At a few points in this thesis I’ve questioned the intent of words issued by Hamilton and Jefferson on the topic of war powers. This is not because I question their integrity, but because I think the seemingly incompatible positions on the war powers question that they sometimes offered reflect two possibilities: one, it could be that the two men were generally conflicted on what was a difficult question to answer even in their own time; or two, Hamilton and Jefferson were following the John Yoo model and saw the balance of war power as a political question that ought to be tried against the circumstances of a particular case and not necessarily against the text of the Constitution.

The language of the Constitution does not explicitly address when, how, and to what extent either the President or Congress can initiate hostilities. Yet we know both branches have that power. The text on this matter is imperfect - perhaps intentionally so.
Madison wrote in *Federalist 48* that “parchment barriers” could not restrain the branches of government. Instead, each branch needed sufficient power to restrain the other.

Congress has an enumerated power to restrain executive war-power overreach – the power of the purse. The President may lead the nation into a state of hostility, but eventually the subsequent operations need funding. President Obama’s decision to participate in operations against the Qaddafi regime required funding. Operations Iraqi Freedom and Enduring Freedom required funding. President Clinton’s commitment of forces to the former Yugoslavia required funding. President Jefferson’s war with Tripoli required funding. If Congress is troubled by a President’s decision or no longer wants American forces participating in hostilities, it can always cut the requisite funds.

Voting against military operations such as those just mentioned can be unpopular. It could be viewed as unpatriotic or as unsupportive of America’s commitments around the world. But Congress has that power and ought to use it when the military becomes involved in an operation that they deem to be cost prohibitive or unnecessary. In advancing the narrative of an imperial presidency, the focus is removed from Congress. We allow the legislature to escape scrutiny when American troops are put in harm’s way. This is not to say that the modern-day President should get the benefit of the doubt. As commander in chief of the world’s most powerful military and at a time when so much of the world depends on the U.S. military for stability, the American people and members of Congress should pay close attention to the President’s actions. But the narrative of an imperial president distracts the American people from the role that their elected representatives in Congress play in empowering the President.
Some critics of the imperial presidency have made note of Congress’s role in its making. Schlesinger writes that the rise of the imperial presidency “was as much a matter of congressional abdication as of presidential usurpation.” But their critiques of Congress are often a secondary thought – the focus of their angst leveled mainly at the White House. A misunderstanding of the nation’s past facilitates this line of thinking. If we’re led to believe that the imperial presidency resulted from a deviation from our once pure republican government, then instead of evaluating a President’s actions on the merits of each case, we’re led to judge them against a condition that never existed.

The issue of executive war power has proven controversial from the beginning. The Framer’s first disagreed among themselves as to how far the President’s war powers should extend, and later disagreed about what the Constitution said on the matter. While the current geopolitical situation coupled with technological advances in weapons and communication render the President much more powerful than at any other time in American history, the evidence suggests that the fundamental relationship between the executive and legislative branches vis-à-vis war power has changed very little since the founding of the republic.

There is arguably no greater dilemma a society could face than whether or not to go to war. The process by which a country makes that decision should be thoroughly and continually examined. The aim of this thesis has not been to suggest whether or not the current war-making process needs improving, or by what means it should be changed. But in examining that process, and in making decisions about the men and women we elect to office, we should avoid the myth that says all the answers were once known.
If we accept the notion that the Framers provided answers to every political issue, then critical changes in governance would never be made. In those gray areas of Constitution – the areas that even the Framers disagreed on – the American people and their elected representatives need to find the answers for themselves that best fit their own time. It’s a wise and worthwhile endeavor to consult the Framers. But where their original intent is not clearly defined, it serves no purpose to pretend otherwise. This is especially true as it relates to the issue of war powers.
NOTES

Chapter One

2. Ibid., 178.
3. Ibid., 213.
4. Ibid., 187.
5. Ibid., 192.
6. Ibid., 207.
8. Ibid., 180.
9. Ibid.
13. Ibid., 23.
15. Ibid., 1.
16. Ibid., 2.
17. Ibid., 3.
18. Ibid., 5.
19. Ibid., 4.
22. Ibid.
23. A detailed summary of each of these cases can be found at the Library of Congress’s War Powers website: http://www.loc.gov/law/help/war-powers.php


28. Ibid.


30. Ibid.

31. Ibid.

32. Ibid., 275.


34. Ibid.

35. Ibid.

36. Operation Odyssey Dawn refers to American operations conducted in conjunction with the larger NATO operation – Unified Protector.


44. Ibid.


46. Ibid.

Chapter Two

2. Ibid., 43.
3. Ibid., 46.
5. Ibid.
6. Ibid.
7. Ibid., 202
8. Ibid., 206
9. Patrick Henry Virginia Ratifying Convention, June 7, 1788
10. Ibid.
11. Alexander Hamilton, Federalist 25
12. James Madison, Federalist 41
13. Alexander Hamilton, Federalist 69
14. Alexander Hamilton, Federalist 74

Chapter Three

3. Slaughter, 95.
5. Ibid., 79.
6. Ibid., 89.
7. Ibid., 117.
8. Ibid., 120.
9. Ibid.
10. Ibid., 122.
12. Slaughter suggests that Washington already had his mind made up, and that the peace delegation “was a sham.”
13. Slaughter, 204.
15. Ibid.
16. Ibid.
18. Ibid., 16.
19. Ibid., 31.
20. Ibid., 65.
21. Over time, the scandal became known as the XYZ affair.
22. Ibid., 91.
23. Ibid., 96.
24. Deconde notes that throughout Virginia there were widespread demonstrations against Adams and Marshall.
26. Ibid., 112.
27. Ibid.
28. Ibid., 281-282.
30. Ibid.
31. Because those nations were never recognized as foreign powers, Congress never saw fit to declare war.
33. Fehlings notes that Congress has never declared war without first being asked to do so by the President.

**Chapter Four**

4. Ibid.
5. Toll, 27.
6. Ibid., 25.
7. Oren, 19.
8. Ibid., 21.
11. Ibid., 38.
15. Ibid., 27.
16. Wheelan, 44.
17. Wheelan refers to Jefferson’s calculations as “dubious math.”
18. Ibid., 45.
21. Ibid., 33.
22. Ibid.
23. Toll, 36.
24. Ibid., 40-41.
25. Ibid., 62.
27. Toll, 169.
29. Oren, 55.
30. Toll, 171.
32. Ibid.
33. Ibid.
35. Ibid.
36. Ibid.
37. Ibid.
38. Carson, 412.
39. Ibid.
41. Annals of Congress, Senate, 7th Congress, 1st Session, December 1801
42. Annals of Congress, House of Representatives, 7th Congress, 1st Session, December 1801
43. Ibid.
44. Ibid.
45. Annals of Congress, House of Representatives, 7th Congress, 1st Session, January 1802
46. Ibid.
47. Annals of Congress, Senate, 7th Congress, 1st Session, February 1, 1801
49. “An act for the protection of the commerce and seaman of the United States in the Mediterranean and adjoining sea,”
   http://www.constitution.org/uslaw/sal/002_statutes_at_large.pdf (accessed March 5, 2012)
50. Ibid.
51. Meacham, 365.
52. Toll, 172.
53. Ibid., 223.
   http://constitution.org/uslaw/sal/002_statutes_at_large.pdf (accessed March 5, 2012)
55. Annals of Congress, House of Representatives, 8th Congress, 1st Session
56. Wheelan, 105.
57. Ibid.
59. Ibid., 229.
   http://avalon.law.yale.edu/19th_century/bar1805t.asp (accessed October 12, 2012)
63. Ibid., 338.
65. Ibid.
66. Ibid.
67. Zacks notes that Secretary of the Navy Robert Smith gave vague instructions on Eaton’s mission to Commodore Barron, while Secretary of State Madison relayed to Lear the exact amount of money to be spent on the coup attempt. He suggests Jefferson wanted the matter handled this way to maintain plausible deniability.
69. Zacks, 378.
Conclusion

2. Schlesinger, *The Imperial President*, ix
BIBLIOGRAPHY

Primary Sources

Annals of the Congress of the United States of America, Senate, 7th Congress, 1st Session

Annals of the Congress of the United States of America, House of Representatives, 7th Congress, 1st Session


----------------------------------


----------------------------------


----------------------------------


----------------------------------


----------------------------------

“Act Further to protect the commerce and seamen of the United States against the Barbary Powers.” http://constitution.org/uslaw/sal/002_statutes_at_large.pdf (accessed March 5, 2012)


**Secondary Literature**


